Central Law Journal.

ST. LOUIS, MO., AUGUST 28, 1903.

POWER OF INCORPORATED FRATERNAL SOCIETIES TO BORROW MONEY AND ISSUE NEGOTIABLE PROMISSORY NOTES.

Unless expressly restrained by its charter, every corporation has the incidental power to make any contract, and evidence it by any instrument that may be necessary and proper to accomplish the objects for which it is created. A note or bill, therefore, made or received by such corporation is, *prima facie*, within its corporate powers, and therefore valid. No authorities need be cited for this general statement, at least as far as the United States is concerned. In England the rule as to the implied power to issue negotiable instruments is confined very strictly to manufacturing, trading and banking companies and similar enterprises whose business *requires* the exercise of such power.

With this general rule before us, we direct our inquiry at the particular question—Has a fraternal society or association which draws all its funds from the voluntary payment of assessments and calls upon members, and whose articles of incorporation or the statute under which it is formed contain no express power to borrow money or issue notes, the power to execute promissory notes with the quality of negotiability? We think it has.

Under the general rule which we have already stated, a corporation of *any kind* has the implied power to borrow money and execute negotiable instruments. This applies to all incorporations, social, religious, fraternal, banking, trading, or manufacturing. The only question in any of these cases is whether the money borrowed or secured by the execution of promissory notes was for a necessary or legitimate object, having in view the purposes of the organization. Thus, a church or other incorporated religious organization may issue its notes as security for a loan to build or repair its church buildings. Cattron v. Universalist Society, 46 Iowa, 106; Donnelly v. Episcopal Church, 26 La. Ann. 738; First Baptist Church v. Caughey, 85 Pa. St. 271. In the last case cited the court said: "Some thirty years after the corporation was formed, the church edifice became unsuitable and inadequate for the enlarged congregation. It therefore resolved to rebuild and enlarge the meeting house. This required an expenditure beyond the sum subscribed by voluntary contributions for that purpose. The meeting house was rebuilt. Had the corporation power to contract a debt in rebuilding beyond the amount subscribed? We think it had. The object of its incorporation could not be fulfilled without the meeting house. No clause in its charter forbid its contracting a debt in the erection of its necessary buildings. Whether it hired laborers and bought materials on credit, or whether it borrowed money with which to pay for the labor and materials when procured, the liability incurred was for the same purpose. As it could not have successfully defended against the wages of a laborer employed in the erection of the house, through want of power to employ him, so it cannot defend against the payment of money borrowed and actually expended in the erection of the church."

As to clubs and associations of other kinds this same rule also obtains. Thus in Bradburg v. Boston Canoe Club, 153 Mass. 77, it was held that a corporation for encouraging athletic exercises, given power to hold real and personal estate, and to hire, purchase, or erect suitable buildings for its accommodation, had authority to borrow money for the purpose of erecting a building. The same rule applies also to agricultural and mechanical associations authorized by their charters to acquire lands and erect buildings: Thompson v. Lambert, 44 Iowa, 239; Taylor v. Agricultural Association, 68 Ala. 229; to merchant's exchange associations: Barry v. Merchant's Exchange, 1 Sandf. Ch. (N. Y.) 280; to a corporation for the erection of a monument: Hayward v. Pilgrim Society, 21 Pick. (Mass.) 270; and to building and loan associations: Davis v. Building Union, 32 Md. 285; Murray v. Scott, L. R. 9 App. 519; Muth v. Dolfield, 43 Md. 466.

The power exists also as to all kinds of insurance companies, whether fire, life, accident, or marine, and in mutual as well as joint stock companies. The only case which lays down a different rule as to insurance companies is Bacon v. Mississippi Insurance Co., 31 Miss. 116, where it was held that a cor-

poration organized under a charter authorizing it to make insurance on property against loss, had no power to contract debts or borrow money to pay its liabilities, and *prima facie*, no authority to execute a negotiable promissory note, unless expressly authorized to do so by its charter, and that it was incumbent on the holder of such a note to show, in a suit against a corporation to collect it, the circumstances, if any exist, which would render it legal and valid, as no presumption could be indulged in favor of the validity of a corporate act, which is not expressly authorized by the charter or warranted by necessary implication. This case stands alone, however, facing quite a formidable array of authority. Talladega Insurance Co. v. Peacock, 67 Ala. 253; Straus v. Eagle Insurance Co., 5 Ohio St. 59; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412; Nelson v. Eaton, 26 N. Y. 410; Bezou v. Pike, 23 La. Ann. 788; Clark v. Titcomb, 42 Barb. (N. Y.) 122.

Nor, as we have before suggested, is there any exception made in cases of mutual insurance companies. They also have the power to borrow money and negotiate commercial paper. Matter of Hercules Mutual Assurance Society, 6 Ben. (U. S.) 35; Orr v. Mercer Mutual Fire Insurance Co., 114 Pa. St. 387. Nor, still further, is there any exception made in cases where the maker of a promissory note is a pure fraternal benefit order depending upon the assessment of its members for any funds which it has a right to disburse. Odd Fellows v. Sturgis National Bank, 42 Mich. 461. The only limitation on the power to borrow money or execute negotiable instruments by a mutual or fraternal insurance society, is that the money obtained by the exercise of such power shall be for the legitimate use of the society and necessary to the usual conduct of its business. Trenton Mutual Life Insurance Co. v. McKelway, 12 N. J. Eq. 135. This rule, however, is itself limited by the rule that the lender of the money or the payee of the note, while he is justly required to examine the source of power and ascertain whether the association has the claimed or asserted power or not, cannot be expected to follow the money and see that it is applied to a legitimate corporate purpose. Thompson v. Lambert, 44 Iowa, 239.

The question as to what is not a proper or legitimate purpose, on account of which a mutual insurance society has not the power to borrow money or issue its promissory note, is clearly discussed in the case of Trenton Mutual Fire Insurance Co. v. McKelway, 12 N. J. Eq. 133. This was a mutual company, the funds from which losses were paid being made up out of the premiums paid by the members of the society. The directors of the company decided to raise a guaranty capital of $150,000. It borrowed the money and gave its notes therefor. On the insolvency of the company an assessment was made sufficient to cover the liability on this indebtedness. The court held that the company had no authority to borrow money for the purpose stated, and that, therefore, no assessment could be levied to meet the obligation given to secure a loan for that purpose. The court said: "Was it within the scope of the powers of this corporation to provide any other capital or fund as the basis of the business which it was empowered to pursue than one provided by the charter itself? If it was illegal for them to create such capital, then a contract which they may have made for the payment cannot be enforced. This corporation was incorporated for the purpose of insuring lives and loss by fire. The charter provides the fund out of which losses are to be paid, and it is this feature in the charter which stamps the character of this corporation, and which makes it what its name imports, and what the legislature intended it should be, a *mutual* company. The corporators are mutual insurers; and it is the fund which is made up from the premiums which they contribute, and one per cent. on the amount for which each one is insured, out of which they are to be indemnified for any losses. They have no right or authority, by their charter, to create any other fund for the purpose. If they do, it is in violation of the principle which is to govern their mode of doing the business for which they were incorporated. It is admitted, on the argument, that it was not within the scope of the powers of this corporation to create any capital other than that which the charter provides. It was attempted to escape the consequences of such an act by the argument that this was nothing more than a contract for a loan of money, out of which the corporation might meet losses.

Under some circumstances, it is true a contract *bona fide* made for such loan would not be illegal, nor in contravention of the charter. For instance, should the incorporation incur a loss, and not have the available means to meet it, it would not be illegal for them to make a loan to meet the exigency. But they cannot, under pretense of borrowing money, provide a fund for the purpose of giving credit to the company."

NOTES OF IMPORTANT DECISIONS.

ACCIDENT INSURANCE—WHAT IS MEANT BY "VISIBLE EXTERNAL MARKS" OF THE INJURY.—Accident policies contain a provision very often contested, the exception generally inserted in a policy that it will not cover injuries which leave no visible external marks upon the body. A recent case has added an interesting contribution to the cases discussing this question. Horsfall v. Pacific Mutual Life Insurance Co., (Wash.) 72 Pac. Rep. 1028. In this case a policy insured deceased against the effect of bodily injuries caused solely by external, violent and accidental means. Deceased was a strong, apparently healthy man, 58 years of age, who had never been sick, and who was accustomed to lift from 200 to 250 pounds without difficulty. Immediately after making a lift of a bar weighing from 350 to 400 pounds, he became sick and pale, his extremities became cold, and cold perspiration stood out on his face and hands, and the exertion caused a violent dilation of the heart. The court held that the accident was within the terms of the policy.

But the policy in this case had still another provision, *i. e.*, that the insurance did not cover injuries of which there were no visible external marks upon the body. But the court held that the pallor and sickness of deceased, together with the bluish gray color which his skin, previously ruddy, became the day after the accident, were visible external marks, within the meaning of the policy. In discussing this point the court said: "It is also urged that the injuries causing death left no visible external mark, produced at the time of and by the accident, upon the body of deceased, and therefore, the injury was one excepted from the policy. The evidence, as stated above, shows that immediately after the accident the deceased became deathly pale and sick, his hands and feet became cold, and the perspiration stood out on his face and hands. The next day after the accident his skin, which previously had been ruddy, became a bluish gray color, and remained so until his death. These, we think, were visible external marks,' and sufficient to bring the case within the terms of the policy. The rule is stated in 1 Cyc. p. 252, as follows: "The external and visible sign or mark required by the proviso that the policy will not cover 'any injury, fatal or otherwise, of which there is no visible mark upon the body,' need not necessarily be a bruise, contusion, laceratton, or broken limb. It may be any visible evidence of an internal strain. Nor is it necessary that such evidence be present immediately after the happening of the accident." United States Mutual Acc. Ass'n v. Barry, *supra*; Thayer v. Insurance Co., 68 N. H. 577, 41 Atl.Rep. 182; Gale v. Mutual Aid, etc., Ass'n, 66 Hun, 600, 21 N. Y. Supp. 893; Menneily v. Employers' Liability Assur. Corp., 148 N. Y. 596, 43 N. E. Rep. 54, 31 L. R. A. 686, 51 Am. St. Rep. 716; Pennington v. Pacific Mutual Life Ins. Co., 85 Iowa, 468, 52 N. W. Rep. 482, 39 Am. St. Rep. 306; Whitehouse v. Travelers' Ins. Co., 29 Fed. Cas. 1038 (No. 17,566); Union Casualty & Surety Co. v. Mondy (Colo. App.) 71 Pac. Rep. 677.

HABEAS CORPUS—DISCHARGE UPON HABEAS CORPUS OF PERSONS EXECUTING FEDERAL LAWS.—One of the many peculiarities arising under the dual sovereignty existing in the United States is disclosed by the recent case of *In re* Matthews, 122 Fed. Rep. 248. In this case a deputy police officer of a certain town in Kentucky attempted to arrest a deserter from the United States army under authority of an act of congress, providing that it shall be lawful for any civil officer having authority under the laws of any state to arrest offenders to summarily arrest a deserter from the military service of the United States, and deliver him into the custody of the military authority. The deserter, trying to escape arrest, was fired upon and wounded by one of the posse, and petitioner was indicted and held in custody by the state authorities for such shooting. He petitioned a federal court and obtained a writ of *habeas corpus* on the ground that the act for which he was held was one done in pursuance of a law of the United States. The court held that the question whether the law authorized the shooting in making the arrest being a doubtful one, and the evidence being inconclusive as to whether there was reasonable ground to believe it necessary to prevent the escape, and also as to whether petitioner was a police officer, either *de jure* or *de facto*, the court would not discharge him, but would leave him to present his defense under the federal law to the state court.

The principle laid down in Cunningham v. Neagle, 135 U. S. 1, that a state court has no jurisdiction of an act committed in pursuance of federal authority, is a principle now so well settled in our jurisprudence as to need no authorities to sustain it. In the principal case, however, the court makes an exception, and holds that where the case is not urgent, the federal court will not interfere on *habeas corpus* to release the prisoner from state custody but will leave him in the jurisdiction of the state court, there to plead any matter of defense he may have. In making this exception, the court said:

"Should this case, be made an exception to this class of cases? The prisoner, Matthews, is not a

federal officer or agent. If officer at all, he is an officer of the state that has him in custody. Though the national government is interested in having deserters from its army arrested and the authority in relation thereto conferred by its law exercised, the imprisonment of Matthews will interfere only with his arresting other deserters whilst he is in custody. It will not interfere with others having authority so to do exercising that authority, and the only question left in uncertainty pending the final disposition of the proceeding by virtue of which he is held is as to the right of a civil officer to shoot in order to effectuate the arrest of a deserter. There is no uncertainty as to his right to arrest without the use of such means, and that summarily, *i. e.*, without a warrant. Counsel for the state intimates that a warrant is necessary to enable a civil officer to arrest a deserter under the law in question. I think not. The words, "Having authority under the laws of the United States or of any state, territory or district to arrest offenders," were intended simply to designate what civil officers had power conferred upon them to arrest deserters. They were officers who had authority to arrest. Such officers were thereby empowered not only to arrest, but to "summarily arrest," deserters. The authority to shoot in order to effectuate an arrest of a deserter, if it exists under this law, can be vindicated in the course of the proceedings under which the prisoner is held. It does not appear that the prisoner cannot give bond pending those proceedings. So far as his present custody is concerned, I have received the impression that it is colorable, in order to give me jurisdiction. The only hardship upon the prisoner in requiring him to vindicate his right to shoot under said law in the course of the proceedings by which he is held is the expense thereof. There is no showing as to his ability to meet this, and as his attempt to make the arrest was voluntary, and not compulsory, and, no doubt, was to secure the reward in such cases provided, there is not as much hardship in this particular as there might otherwise be. It would seem, therefore, that if there is an exception to this class of cases, as to the duty of the federal court, or judicial officer appealed to, to interpose by *habeas corpus*, there is some reason, at least, for contending that this case is one. And why is it that there may not be an exception thereto? Surely if, in order to justify a federal or judicial officer interposing in a case where one is in custody of state authority in violation of the federal constitution or laws, it is necessary that it be a case of peculiar urgency in order to justify such interposition, when one is in custody in pursuance to federal authority it must also be a case of peculiar urgency. If there is any distinction between the two classes of cases, it must be in the fact that, as a rule, in the one class there is no peculiar urgency, and, as a rule, or always, in the other class there is peculiar urgency. It is sometimes said that a state court is without jurisdiction to try and punish one for acts done in pursuance to federal law, and that, if it does so, its action is void. By this must be meant not that the state court is without jurisdiction to hear the case involving the question, but that it is bound to give the defendant the benefit of said law, and release him if he acted in pursuance thereto. If it does not do so, and undertakes to inflict punishment upon him, its action is void. But however this may be, a state court is equally without jurisdiction to try and punish one in violation of the federal constitution and laws, and, if it does so, its action is equally void. So there can be no distinction between the two classes of cases in this direction. If, then, in every case, a federal court or judicial officer, when appealed to, must interpose and discharge one in custody for acts done in pursuance to federal authority, it must be that every such case is one of peculiar urgency. Possibly this may be so, and therefore the inprisonment by the state, whose officer he is, of a single policeman, which prevents his arresting deserters from the United States army pending the proceedings under which he is held, and to this extent interferes with the arrest of such deserters, is a case of peculiar urgency. What makes me think that this may be so is that I have found no case coming within that class where the federal court or judicial officer appealed to has refused to interpose. On the other hand, I am led to doubt—and I may say seriously—whether this is so, by the fact that the Supreme Court of the United States has laid down in such emphatic terms that the federal courts, in applying the *habeas corpus* statutory provisions, shall be guided by 'the salutary principles' set forth at the beginning of this opinion, that they should not interpose in such a way, except in cases of peculiar urgency, and that, as a rule, the other class of cases are not of peculiar urgency, and by the further fact that in this case there is seemingly so little ground for claiming that it is a case of peculiar urgency."

WHEN DOES AN ACTION ACCRUE FOR THE BREACH OF THE IMPLIED WARRANTY OF TITLE IN THE SALE OF CHATTELS?

WHEN IS A WARRANTY IMPLIED?

a—In America—It is settled law in America that in every sale of personalty, in possession of the vendor, there is an implied warranty of title on the part of the vendor, unless it can be affirmatively shown that he intended to convey only his interest therein. There was at one time, a disposition to limit this to sales where the property was in the actual possession of the vender and this rule found the support of a few courts, notably that of the state of Maine.[1] Its adoption by this court seems due to the statement of Chancellor Kent that "if the property be at the time in the possession of another, the rule of

[1] Huntington v. Hall, 38 Me. 501, 58 Am. Dec. 765.

caveat emptor applies."[2] This is based on the early English cases and Kent's conclusion can be accounted for by the fact that at the time he wrote, the English rule was in process of change and the courts had come to construe possession, in nearly all instances, as equivalent to an assertion of express warranty.

But whatever may have been the rule, the trend of opinion in America now is to extend the implication of warranty to all cases of sale of personalty, whether the goods be at the time of the sale, in possession of the vendor or not.

b—In England—In England the law has gone through a process of change, completely reversing the early holdings of the courts. By the early authorities, there was no more a warranty of title than of quality. The rule of caveat emptor applied, and in order to create a warranty of title, it was necessary to express it. This was doubtless due to the fact that in the early stages of English jurisprudence, by far the greater number of sales of personalty occurred at fairs in market overt, where the vendee obtained a good title against the world, thus making the warranty of title unnecessary. The rule was gradually changed until a warranty was implied from customs of trade and all expressions of ownership were construed as express warranties and the vendor was held liable if even by his conduct it could be said that he sold the property as his own.

The general dissatisfaction of the early rule was evident from the extremes to which the courts went in construing the silence of the vendor as sufficiently fraudulent to set aside the sale or give rise to an action of deceit; for it was held as early as the time of Littleton that if the vendor knew of the defect in the title and failed to disclose this fact, he was always held responsible to the vendee for fraud.[3a] As Marvin, J. said in Sweetman v. Price: "With such an understanding of the law, the courts might well be astute in finding a remedy as upon an express warranty or for deceit." Finally, in Eickholz v. Bannister,[4] while specifically stating that "it is not necessary to decide whether there would be an implied warranty in all cases," yet the early rule is practically repudiated not only by the tone of the decision, but by the direct assertion that "there can seldom be a sale of goods where one of these circumstances is not present"—meaning circumstances from which a warranty would be implied. So the rule can be stated that in England there is always an implied warranty of title in the sale of personalty unless there be present some facts expressly negativing this implication. Under both the American and English rules, the warranty protects against incumbrances and liens of all sorts, if the enforcement of them would interfere with the vendee's right of possession or enjoyment.[5]

AS TO NATURE OF THE CONTRACT INVOLVED.

a—Executory Contracts—It is hardly correct to speak of a warranty of title in connection with an executory contract. Prof. Mechem, in his recent work on Sales, says that "sale is pre-eminently the transfer of title."[6] If this be true, then the existence of the title in the vendor must be an absolute requisite to the consummation of the contract of sale. It becomes, in fact, a technical condition precedent and this is the view taken of it by both the courts and text-book writers. A failure of title in the vendor, therefore, gives the vendee the right to repudiate the contract and refuse the goods, or if he has paid money in advance, to sue for it as in case of failure of consideration. As to this point there seems to be no dispute.[7]

b—Executed Contracts—In the great majority of cases, the failure of title in the vendor does not become known to the vendee until after the contract has been consummated and the possession has been transferred. There is, of course, nothing to prevent the vendee from accepting the goods even after he has discovered the failure of title in the vendor. In this case, while he has waived the right to repudiate the contract, he still has the protection of the warranty which accompanies every sale of personalty.

The defect in the title may become apparent in a variety of ways. The vendor may casually discover it, it may be made apparent by a seizure of the property under a writ of replevin or attachment at the instance of the real owner, or execution may have been issued against it on a judgment against the real owner. But however the defect may be disclosed, the question of the vendee's rights against the vendor becomes of prime importance, and on this question the courts are in a state of conflict and confusion.

The question of what constitutes a breach of the implied warranty of title has generally come before the courts in actions on the contract of warranty, and it is here that the conflict has arisen as to what is necessary in order to give the vendee a right of action. Nowhere has there been so much discussion on this subject as in the courts of New York. As the present holdings of those tribunals fairly represent the prevailing rule, perhaps the best way to follow its growth is by a review of the decisions in that state.

The first reported case in which the question seems to have been involved is that of Vibbard v.

[2] 2 Kent's Com. 476.
[3] Co. Litt. 102a.
[3a] 26 N. Y. (1863), 224.
[4] 17 C. B. (N. S.), 708.
[5] Dresser v. Ainsworth (N. Y. 1850), 9 Barb. 619; Close v. Crossland (1891), 47 Minn. 500.
[6] Mechem on Sales, sec. 1.
[7] Brewer v. Broadwood (1882), 22 Chanc. Div. 105; Pope v. Allis (1885), 115 U. S. 363; Smith Pers. Prop. sec. 114; Tied. Sales, sec. 197; Benj. Sales (Ed. 1888) 851.

Johnson.[8] This was an action by Johnson for a chest of tea sold and delivered. One of the defendants below applied to Johnson for a chest of tea, which Johnson let them have and charged to their account. On the trial, defendants below offered to prove that at the time of sale, Johnson knew that one Vibbard, a relative of the Vibbard in the case, owned the chest in question and that said Johnson knew that defendants below had already bargained for the chest with the true owner; and in bar of the action, that they had paid the true owner. Spencer, Ch. J., said that the defendants had seen fit to satisfy N. Vibbard, the real owner, for the tea, and now to set up his right in this action, but that this they have no right to do. They cannot, in this way, draw the plaintiff's title into question, by their own voluntary act of payment It is not competent for them to dispute the title of their vendor, unless they have been charged at the suit of another person who has, after contestation, shown a better title. He then likens the position of the parties to that of landlord and tenant, and says that not until superior title has been shown and rent recovered by a third person, can the tenant deny the landlord's title.

It will be seen. however, that the facts in this case were peculiar and doubtless had some bearing upon the decision, because the owner seems to have taken this method of depriving the possessor of whatever claims he had to the chattels. But twenty years later, in the case of Case v. Hall,[9] the question was fairly presented, and the rule laid down on this occasion made it the leading case on the question for many years, and although materially altered by later decisions of the same court, it still retains its place of prominence. This was a case of *assumpsit* on two notes given for timber sold by plaintiff to defendant. At the trial the defendant offered to show that the plaintiff had no title to the timber, and that the real owner had notified the defendant that he would hold him responsible for it. It was admitted that the real owner had not recovered or sued for the timber. The evidence was rejected. Nelson, C. J., said that where "the vendee relies on the warranty of title, express or implied, there must be a recovery by the real owner before an action can be maintained. This is in the nature of an eviction, and is the only evidence of the breach, in analogy to the case of covenants real. The principle is well sustained by analogy, and I think it just in itself. In case of a breach of warranty, the measure of the damages is the purchase price and interest. Now, it would be highly inequitable to permit the vendee to retain the possession or enjoy the use of the property thus acquired, and put his vendor at defiance. Possibly the owner may never enforce his title, or, if he does, the seller may settle with him. The breach implies no bad faith and the indemnity is complete by responding therefor after a recovery under a paramount title. If there has been fraud in the case, the remedy is immediate for all damages suffered, and to this they may resort, if they apprehend loss from the delay in the claim of the owner." The defendants argued that the warranty of title was analogous to that of covenant of *seisin* and right to convey, but the court refused to take this view, saying "this would be extending the implied warranty beyond the analogous case of lands and chattel interests."

The confusion arising from this case seems to have come from the word "recovery," which has been commonly understood to mean a recovery as the result of legal determination. The question was not put at rest until fifty years later in the case of Bordwell v. Collie, *infra*, and until a vast amount of confusion had been created by the construction given it in other courts.

The next time the question arose was in the case of Delaware Bank v. Jarvis.[10] This was an action against the indorser of a note on the warranty of title, and, although the precise question involved was one of costs, Comstock, J., said these depend upon the nature and effect of the warranty of title. He then says: "On a sale of chattels with a warranty of title, whether express or implied, it appears to be well settled that in the absence of an actual dispossession under a better title, no breach can be alleged before a suit and judgment at law against the title of the vendor. It has never been held that mere want of title, without eviction, or judicial determination will sustain an action in such cases. And he cites, as authority, the decision in Case v. Hall, *supra*.

The question was next presented in Sweetman v. Prince.[11] This was an action by Sweetman as assignee of one Klotwig, against the defendants, for the price of certain logs sold by Klotwig to them. By way of defense, the defendants answered that title to the logs were in one LeRoy, who had made a claim for the same, and that Klotwig was aware of this lack of title at the time of sale. The trial court charged the jury, that if the owner asserted title and forbade payment to Klotwig, that plaintiff could not recover. From the granting of a motion for a new trial, plaintiff appealed to the general term. Here, Mullin, J., said that it was not necessary to cite authorities to show that a purchaser of personal property cannot defeat a recovery for the price by showing that the property is owned by another, unless he has been ousted or there has been a recovery by the true owner. This was clearly in accord with the rule laid down in Case v. Hall, but the motion granting the new trial was sustained on other grounds, and the question

[8] 19 Johns. (N. Y. 1821), 78.

[9] 24 Wend. (N. Y. 1840), 102, 35 Am. Dec. 605.

[10] 20 N. Y. (1859), 226.

[11] First decided by the supreme court in 62 Barb. (N. Y. Supr. 1862), 256, and later by the court of appeals (1863), 26 N. Y. 224.

was presented to the court of appeals. In this case, Marvin, J., said that he (Klotwig) sold and delivered the logs to the defendant, knowing that he had not a complete title, and saying nothing about the title, and, that under these circumstances, the court was requested to hold that no recovery could be had against the defendants, though they had not been disturbed in their possession by the real owner. When the purchaser is satisfied that the claimant of the property is the true owner, and can and will, in an action against him, recover the property from him, he will not be bound to resist the claim of such owner, but may abandon the property to the true owner without action, taking upon himself the *onus* of showing, if sued for the price by his vendor, that the latter has no property in the goods, and that he to whom he surrendered the property upon claim had the title and the right of possession. The covenant for quiet enjoyment is not broken until there has been a lawful eviction by paramount title. This need not, however, be by process of law. The law is the same in the case of implied warranty of personalty. This was all pure *dictum* because there was no claim that the defendant had been disturbed or had surrendered possession, and the soundness of the charge by the trial court was not directly passed upon by the court of appeals. But this *dictum* opened up the way for the adoption, at a later day, of the opinions therein expressed.

In the case of Burt v. Dewey [12] the question was again presented. Here the plaintiff had bought a horse of the defendant. He was afterwards sued by the true owner and judgment was recovered against him, but no execution had issued. Plaintiff sued on contract of warranty, but waived all claims for nominal damages. James, J., said that the important question in that case is, whether the plaintiff can recover without actual loss or damage, by reason of defendant's want of title. He then proceeded to state that the plaintiff could not recover for, although there had been a judgment rendered, it, until satisfied, established only a liability and not a loss. It might never be enforced. It seems that a recovery for nominal damages might have been had, had they not been waived; for in Lester v. Windmuller [13] the court speaks of this case as authority for such a right. But the court was not content with deciding the case presented and proceeded to say that the vendee is not bound to await legal action against him. If satisfied of the vendee's insufficiency of title and the ability of the real owner to recover, he may surrender the property and recover against the vendor by affirmatively establishing that he is without title. In support of this the court cites as authority the dictum of Judge Marvin in Sweetman v. Price and accepts it as acknowledged law.

[12] 40 N. Y. (1869), 283, 100 Am. Dec. 482.
[13] 20 Jones & S. (N. Y. Supr. 1872), 419.

The injustice and absurdity of the results following a strict adherence to the rule laid down in Case v. Hall was shown by the case of Bordwell v. Collie.[14] This gave the court an opportunity to alter the old rule and add judicial sanction to the dicta in previous cases. The case was an action upon the implied warranty of title to a horse. One Richter, while owner of the horse, mortgaged it. He then sold it to the defendant, who sold it to one Douglass, who in turn sold it to the plaintiff, and he to one Smith. The horse was taken from Smith under the mortgage. He demanded and received repayment from his vendor, the plaintiff herein. The plaintiff then called on Douglass, who in payment assigned his claim against his vendor—the defendant herein—to the plaintiff. Here there was no eviction by judicial proceedings. Each successive vendor had paid his vendee upon presentment of claim and the expense attendant upon at least two actions had been avoided; yet if an eviction by law were the only evidence of a breach, the plaintiff in this action could not have recovered, although he had pursued the course of honesty and fairness. In passing upon the question, Barker, J., said that the covenantee could hot have an action against his covenantor unless he had been damnified in consequence of the breach of the implied warranty. There must be a recovery by the real owner before an action can be maintained; but an eviction by process of law is not necessary. Case v. Hall does not support the propo sition that eviction by law is necessary. The facts of that case required no such holding, for the vendee was in full possession and had not been prosecuted. It seems also that at the time of that decision the courts had not yet held that in actions on covenants real a surrender to a paramount owner was sufficient to sustain the action. As between the possessor of personal property and the real owner, there may be a recovery by the latter upon demand and refusal. Payment of the recovery is tantamount to an eviction and enables the vendee to recover from the vendor. But as long as the vendee is in quiet possession of the thing sold, he cannot maintain an action against his vendor, nor can he settle with the claimant and extinguish the adverse title. He must either submit to an eviction or there must be a judicial determination in favor of the adverse claimant. And if the vendee cannot be prevented from submitting to an eviction, upon claim of the real owner, and thus place himself in a position to proceed against the vendor, there is no reason why an intermediate vendor cannot pay the demand of his vendee. The case was carried to the court of appeals where it is reported as Bordwell v. Collie.[15] Here the lower court was sustained by a vote of four to three. Judge Grover, speaking for the majority, held that the action was analogous to an action on a covenant for quiet possession in conveyances of real estate and that

[14] 1 Lans. (N. Y. Supr. 1869) 141.
[15] 45 N. Y. (1871), 491.

the same rule should be applied. An eviction, he said, is an essential prerequisite in these latter cases. Yet this need not be by process of law. It is enough that on a valid claim, made by a third person under a paramount title, the plaintiff voluntarily yielded up possession. If this is done without legal process, the plaintiff must prove that the title to which he yielded was paramount to the one which he acquired. To hold that the purchaser must become a wrong-doer by withholding property from the true owner, and compel him to resort to an action to entitle him to relief from his vendor, is absurd. Such a rule cannot be supported by sound policy or by reason, and each vendee can recover from his vendor. The court recognized the former holdings to this effect as mere dicta, but considered that they should be given some weight because of their inherent soundness as well as because of the jurists who expressed them. The rule as stated by Judge Grover is reiterated in McGiffen v. Baird.[16] So the rule in New York can now be stated as follows: The vendee can maintain an action on the implied warranty of title only when he has been evicted by one holding a superior title, or when he has yielded possession of the property or the value of the same to one actually claiming under superior title, and in this latter case he assumes the burden of showing that the title to which he yielded was superior to that of his vendor.

The same rule has been adopted by California in the leading case of Gross v. Kierske.[17] In connection with this, another California case is of interest as expressing what that court considers the rule of the civil law on which they base their holding. In Fowler v. Smith,[18] a case involving the title to real estate, Judge Heydenfeldt states this as the view of the civil law; that a sale when made by general terms, implies an obligation on the part of the seller to cause the buyer to have the thing sold, to deliver him possession and defend him against whatever may deprive him of possession. Possession is the great thing looked upon as the object of the purchase and so long as this remains undisturbed, the seller has fulfilled his obligation. Even the title be discovered in another, so long as the vendor retains possession, he can not complain. Whether or not this be the true construction of the civil law, it is surely not the view of a sale taken by the text-book writers and many of the courts, although the rule here advanced has, for other reasons, been quite generally adopted. There is certainly no consistency between the assertion that "possession is the great thing looked upon as the object of the sale" and the statement of Prof. Mechem that "sale is pre-eminently the transfer of title."

The rule of the New York courts has been adopted in New Hampshire,[19] in Vermont,[20] in Alabama,[21] in Missouri,[22] and apparently the rule has the approval of the Iowa courts,[23] although there seems to have been no direct decision on the question. The courts of North Carolina have reached the same conclusion as those of New York, but have based the rule, largely on the principle of estoppel, comparing the relation of vendor and vendee to that of bailor and bailee, and applying the rule which estops the bailee from denying the bailor's title until a better one has been asserted and proven by a third party.[24] New Jersey has based the rule on like grounds.[25]

In contrast with the rule maintained by the courts of New York and the other states just mentioned, is the rule laid down by the courts of Kentucky, and which permits an action at once if the vendor, at the time of sale, did not possess the title warranted. The rule was adopted as early as 1816 in the case of Payne v. Rodden.[26] This was a writ of error to reverse a judgment on a declaration which simply set forth the fact that the vendor of a horse sold the same for a consideration, that the horse was not the property of said vendor, but belonged to another. No allegation of guilty knowledge was made. In affirming the judgment on the declaration, Judge Owsley said the implied warranty of title is not of the character which requires a recovery of the goods by the right owner before the action accrues to the vendee, but is in the nature of an implied undertaking on the part of the seller, that the commodity which he sells is his own, and it is sufficient, in an action for a breach thereof, to allege that the property belongs to another. This rule was referred to and affirmed

[16] 62 N. Y. (1875), 329. Church, C. J., in this case used the following language, which was concurred in by the whole court: "The effect of such a warranty is to guarantee the purchaser against eviction or injury from other parties." He then states four possible conditions which would constitute a breach: first, if the property is taken from the purchaser by title paramount; second, if the purchaser is compelled to pay the true owner the value of the property; third, if the vendee returns upon discovery of the defect in title, and fourth, perhaps where it is impossible, or undesirable to return the property, the vendee may pay the claimant the value without legal proceedings. This, the court says, is the extreme extent of protection afforded.

[17] 41 Cal. (1871), 111.

[18] 2 Cal. (1852), 568.

[19] Sargent v. Currier (1870), 49 N. H. 310, 6 Am. Rep. 524.

[20] Reynolds v. Roberts (1885), 57 Vt. 292.

[21] Johnson v. Oehmig (1891), 95 Ala. 189, repudiating the dictum in Ogburn v. Ogburn (Ala. 1836), 3 Porter, 136.

[22] Matheny v. Mason (1881), 73 Mo. 677.

[23] Barton v. Faherty (1851), 3 G. Greene, 327, 54 Am. Dec. 503, and Brandt v. Foster (1857), 5 Iowa, 292.

[24] Webster v. Laws (1883), 89 N. Car. 274; Hodges v. Wilkinson, 111 N. Car. 56, 17 L. R. A. 545, 15 S. E. Rep 941.

[25] Wanser v. Messler (1851), 29 N. J. L. 256.

[26] 4 Bradf. (Ky.) 304, 7 Am. Dec. 739.

by the same court in Scott v. Scott's Admr.[27] Again, in Chancellor v. Wiggins.[28] In both of these cases, the statute of limitations was invoked to defeat the plaintiff's cause of action; because of their having been bought after the time limited from the time of sale, although within the limited time after the eviction. The case of Tipton v. Triplet,[31] is supposed to have restricted this rule to implied contracts. This was an action on a note, the defendent denying consideration in that the plaintiff had no title to the slaves for which it was given. Chief Justice Simpson said that the pleadings rendered it uncertain whether the warranty was express or implied. If express, no action accrued until the slaves were taken by their real owner. If it can be construed to mean an implied warranty, or rather, an undertaking on the part of the vendor that he had title to the slaves, which is the warranty the law implies, when there is no express warranty, then there was a breach of this implied undertaking if he had no title at the time of sale. This case has been much criticised, as making an unfounded distinction between the express and implied warranty of title. A careful inspection will show, however, that no such distinction is made or attempted. The distinction is between an express warranty of title and the implied undertaking which the law attaches to every sale and which, in Kentucky, is that the vendor has title at the time of sale.

This rule of the Kentucky courts has been limited to the extent of imposing upon the vendee the burden of adducing the most satisfactory sort of evidence that the vendor has no title. But further than this, although it has been the subject of most incessant criticism, it has remained unaltered, and in the late case of Preseys Trustees v. Wathen,[30] Judge Lewis said that there was no rule better established than that a breach of the implied warranty of title to personalty must be regarded as occurring, and the action accruing, immediately upon delivery if, in fact, the title to the goods is then invalid.

In South Dakota the code has adopted the New York rule,[31] while Minnesota has drawn a distinction not made by the courts of any other state, between the effects of an incumbrance and an adverse title to the property. In the case of the former, it is said that there is a technical breach at once. The vendee can, however, recover only nominal damages until the incumbrance is paid by him or his possession disturbed.[32] No reason is stated for the distinction and none is apparent on the face of the proposition.

DISCUSSION OF THE TWO PRINCIPAL RULES.

As to which rule is supported by the weight of authority, there can be no doubt. Apparently, the Kentucky rule is followed in its entirety in no state except Massachusetts, outside of the one where it was first advanced. There is, however, good ground on which to question the weight of reason.

The New York rule doubtless owes its general adoption as much to the great authority of the court which has advanced it as to any inherent virtue which it may possess. It seems to be based primarily on an erroneous theory which, to use the words of Judge Heydenfeldt in Fowler v. Smith, *supra*, is that the principal thing for which the vendee bargains is the possession, and until this is disturbed, he can not complain. "Is this true in fact?" asks Judge Heydenfeldt. "Does the vendee bargain only, or even primarily, for the bare possession and use of the thing purchased? It does not seem too bold to venture this, that were the question put to any number of buyers, the answers would be almost unanimously in the negative. It is no answer to say, for it may be admitted, that if one have the free possession and undisturbed use of a thing, that he then derives as much benefit from the thing itself as he otherwise would. But chattels pass rapidly from hand to hand and the power to pass title is always of value. The very fact that no buyer will pay as much as he otherwise would, for an article, the title to which the vendor expressly refuses to warrant, is proof of this fact. The mere right of title is a valuable one, protected by the courts, and it can hardly be asserted that the vendee does not intend to acquire this quite as much as he does the other rights appertaining to the property. Nor does a reference to the civil law materially assist those who assert this rule; for, as we have seen, this construction is not fully justified by the rule on which it is based."

The courts of New York have laid much stress on the supposed analogy of the warranty in the sale of personalty to those in the sale of real estate. But the adoption of a rule simply because

[27] 2 A. K. Marsh. (Ky. 1820), 217. Here Boyle, C. J., said that it could not be admitted that a recovery is necessary to vendee's right of action. Such an averment is not necessary, because the vendee's right of action does not depend upon it, and he need not wait until such recovery before commencing suit. Counsel attempted to construe this warranty as similar to the covenant for quiet possession in real estate, but the court said that there is a clear distinction between the cases. Here there was no warranty but the implied one, and that is that the vendor has title at the time of sale. The warranty is more like the covenant of *seisin*. In such cases eviction is not necessary, and the action accrues immediately upon sale.

[28] 4 B. Mon. (1843), 201, 59 Am. Dec. 499. Justice Marshall said in this case that it had been expressly decided that the only contract which the law will imply in the sale of chattels, is that the vendor had title at the time of sale, and this in the nature of the covenant of *seisin*, which is broken immediately if the vendor has no title, and the vendee has an immediate cause of action.

[29] 1 Metc. (Ky. 1859), 570.

[30] 90 Ky. (1891), 473.

[31] Hull v. Caldwell, 3 S. Dak. 451, 54 N. W. Rep. 100.

[32] Close v. Crossland (1891), 47 Minn. 500.

of an apparent likeness in conditions, is in itself sufficient to excite suspicion as to its validity in reason. Facts are too seldom found in the same interrelationships to justify the blind application of rules, taken from other branches of the law, simply because there is a supposed resemblance, in some respects, between the two fields. Here, for example, in the sale of chattels the law implies a warranty of title. In nearly all conveyances of real property, there are warranties of title, although the law implies none. These vary in number and effect, and it would be difficult to say just what was meant by the simple term, warranty of title to realty. From a perusal of the words alone, one might reasonably conclude that it meant simply this, that the vendee should have the title and if he did not receive it, that the warranty was broken. But the New York court seems to have argued in this way: Personalty is like realty in many respects; therefore the warranty of title to personalty must be analogous to a warranty of title to realty. But there are several warranties of title to realty, while we only imply one in respect to personalty. We will say, however, that this one of the personalty is analogous to that one of the realty which binds the vendor to retain the vendee in quiet possession. As consistent would it be for an artist to write on two pieces of canvas the name "Napoleon," and then, having drawn on one a full length portrait of the great general, and on the other merely his famous hat, claim that the two were so nearly equivalent that any thing predicated of the one would apply to the other. This would be true as far as the work went, but one does not extend to completeness and therein lies the fallacy.

The one simple warranty of title to personalty can never be equivalent to the several utterly divergent warranties of title to realty, and the method of analogy is applicable not to the two fields, for there is only a similarity of name, but between the one warranty implied in the sale of personalty and one of the many generally provided for in the sale of realty. And here, from the nature of the case, it is not a question of analogy but of sound discretion, the result of which may give rise to analogous rules. But as far as assisting the courts in deciding upon the proper rule to apply, it would have been better had they never heard of the method of reasoning from analogy. The reason given in Case v. Hall, *supra*, that the vendor may settle with the adverse claimant or that the latter may never claim his right, can be said with equal force of any liability to which a third party has subjected you or of any claim that another may have against you. People do not as a rule go into the market to buy law suits. Moreover, the facts are all contrary to the last part of the statement, for property owners do, as a rule, assert their rights, and at any rate it is dangerous precedent to set up vague possibilities in bar of positive rights. But this rule, notwithstanding its apparent inconsistencies, well illustrates the idea that the common law is based on experience and not on logic alone; for, in practical operation, the rule has worked out substantial justice. Contrary to the very reasons given for the adoption of the rule, the adverse owner has generally asserted his claim at an early day, and the vendee has then had his right of action. This has, to a large extent, overcome the serious objection arising from the possibility of the adverse claimant delaying the assertion of his rights until the financial responsibility of the vendor had changed. Under it the vendee is also protected from the operation of the statute of limitations in those cases where the adverse claimant has not asserted his title until after the time limited from the time of sale. It is also true, perhaps, that unless the vendee has desired to transfer the title to the property, he suffers no substantial damage until possession is disturbed or threatened. But since it seems that a sale with knowledge of his deficient title would subject the vendor to an action for fraud, this is a substantial hindrance of the freedom of transfer and still gives rise to a serious objection to the rule.

The Kentucky rule, in so far as it is based upon the supposed intent of the vendee, adopts the theory more in accord with the facts, namely, that the vendee intends to purchase the entire, absolute and unincumbered title with all the rights growing out of possession and absolute ownership. So far as it proceeds simply in analogy to the warranties of title to realty, it is subject to the same criticism as that offered against the New York rule, but this, as has been shown, is not very far. Only to a small extent does it pretend to follow analogy. The court says that the law implies an undertaking on the part of all vendors and that undertaking is, that the vendor has title and that this title has been transferred to the vendee. It does say that this undertaking is analogous to the warranty of seisin in real estate, but that is quite a different thing. The failure to understand this distinction has been the ground for much of the criticism which has been poured forth upon the Kentucky tribunals for distinguishing between the express warranties and what its critics call the implied warranty. The court does distinguish, and rightly so, between the two contracts; not because one is expressed and the other implied, but because the express warranty is what the parties please to make it, while the implied undertaking is always the same, having a fixed, definite meaning, and is, as a matter of fact, much different from the common express warranty of title. Viewed from a purely logical standpoint, the Kentucky court seems to have the best of the contention. But, unfortunately, the Kentucky rule has not always worked out substantial justice, and nothing has cast more reflection upon it than the effect which the statute of limitations has had upon its operation. In at least two of the leading cases, the adverse claimant had not asserted his rights until after the time limited by

the statute from the time of sale, and the rule was invoked to deprive the vendee of his right of action against the vendor. The California court advanced a most valid objection when it said the operation of this rule often deprived the purchaser of the very protection it seeks to extend.[33]

ARTHUR H. RYALL.

[33] Gross v. Kierski, *supra*.

LIMITATIONS — APPLICABILITY TO FORECLOSURE BY EXERCISE OF POWER OF SALE.

CONE v. HYATT.

Supreme Court of North Carolina, June 6, 1903.

1. Limitations do not apply to a power of sale contained in a mortgage or deed of trust where the deed is foreclosed, not in an action brought for that purpose, but simply by the mortgagee or trustee executing the power of sale.

2. The defense that the remedy is barred by limitations may be waived by failing to set it up.

3. A deed of trust provided that the debtor might have one year in which to pay one-half of the debt, and if that one half was paid at maturity then another year to pay the other half. Held, that the creditor might elect to wait until the end of the two years for payment of the entire amount, and the statute of limitations, even if applicable at all to a proceeding by the trustee to sell the land under the power in the deed, would not begin to run until the end of the two years.

4. A partial payment to stop the runing of limitations must be made by some one authorized to make it.

STATEMENT OF FACTS: This action was brought by the plaintiff against the defendant to recover certain lands described in the pleadings. All of the parties claimed under J. W. Young, who, with his wife, on the 8th day of September, 1885, executed a deed of trust to C. E. Graham for the land to secure a debt due to the plaintiff of $1,800, which was evidenced by two notes, one for $800, payable in 12 months, and the other for $1,000, payable in 18 months, after said date, with power of sale to be exercised if the defendant failed to pay the said notes or any part thereof at maturity, the proceeds of sale to be applied to the payment of the notes, whether both are due at the time of sale or not. Young having failed to pay the said notes when they became due, and the debt remaining unpaid on May 14, 1884, he executed on that date to said Graham another deed of trust conveying the same land and an additional tract, reciting the nonpayment of the notes and the agreement of the plaintiff to forbear the enforcement of the trust and allow Young one year from said date to pay one-half of the indebtedness, and, if one-half should be paid at the end of the year, then another year within which to pay the remaining part of the debt. It was further provided in the deed that if there should be default in the payment of one-half of the debt at the end of the first year, or if that one-half was paid at maturity and there should be default in the other half at maturity, then the trustee should be authorized to sell the land and apply the proceeds to the payment of said debt. Young failed to pay either one of the notes, and the trustee, some time before December 16, 1900, advertised the land for sale on January 14, 1901, and sold it on that day, under the power contained in the deed, to the plaintig, and executed a deed to him. There was evidence tending to show that on February 27, 1888, Young paid $100 on the debt, and on December 16, 1900, the proceeds of the sale of part of the land which was sold under the power were applied to the debt by the trustee. The amount bid at the sale by the plaintiff was paid by him on January 14, 1901, and also credited by the trustee on the debt, leaving a balance of $2,600 or moredue the plaintiff on the notes.

The plaintiff requested the court to charge the jury that the right of the trustee to sell under the power was not barred by the statute of limitations until May 4, 1901, and further that the plaintiff and trustee, if there was default in the payment of the first first half of the debt, could elect to wait until the maturity of the second note before selling under the power, and, they having elected to sell after the latter date, the statute did not begin to run until May 4, 1891. The court refused the instruction, and charged the jury that upon the evidence the plaintiff was barred by the statute, and that they should answer "No" to the second and third issues, which were as follows: "(2) Is the plaintiff the owner of the land sued for and described in the complaint? (3) Is the defendant in the wrongful possession of said land?" The jury answered the issues accordingly. The plaintiff in apt time excepted to the rulings and charge of the court, and appealed from the judgment rendered upon the verdict.

WALKER, J., after stating the case: We have held at this term, in Menzel v. Hinton, 44 S. E. Rep. 385, that the statute of limitations does not apply to a power of sale contained in a mortgage or deed of trust when the deed is foreclosed, not in an action brought for that purpose, but simply by the mortgagee or trustee executing the power of sale. The statute was intended to apply only to actions or suits, and this is apparent from the very language of the law. In a case where it became necessary to decide whether a sale under a power was a suit or an action within the meaning of a statute, it was held that "a proceeding to foreclose a mortgage by advertisement is not a suit; such a proceeding is merely the act of the mortgagee exercising the power of sale given him by the mortgagor. In no sense is it a suit in any court, and all the definitions of that word require it to be a proceeding in some court." Hall v. Bartlett, 9 Barb. 300. In Williams v. Mullis, 87 N. Car. 159, it appeared that a sale had been made under an execution issued upon a judgment which was barred by the statute, and a motion was made to set aside the sale on this account. This court held that the statute could not be

availed of except by answer, and, in the opinion of the court, Ashe, J., clearly sets forth the reason for the decision, in the following language: "If, then, the statute applies only to the remedy, it cannot operate to extinguish the judgment after the expiration of the ten years, until an action or proceeding in the nature of *scire facias* is brought to revive it, when the statutory bar may be set up by answer as a defense to the action; and this is the only mode prescribed in the Code of Civil Procedure by which a defendant can avail himself of such a defense." It is needless to pursue the discussion of this branch of the case any further, as the matter is fully examined, and the principles which govern in such cases are fully set forth in Menzel v. Hinton, *supra*.

This ruling is, perhaps, sufficient to dispose of this appeal, but if the statute had applied to the case presented, it could do so only by analogy, that is, by treating the proceeding taken out of court by the trustee in the execution of the power as substantially the same as a suit or action to foreclose the trust, and if this is done the analogy must be complete, and the same principles which would apply to the suit or action should be extended throughout to the proceeding for the execution of the power. The argument advanced to show that the statute does not apply to the execution of the power by the trustee must proceed upon the assumption that there is such an analogy, for it must be conceded, in view of so many decisions by this and other courts which establish the proposition, that the debt is not extinguished by the running of the statute, and the latter affects only the remedy. The argument cannot be sustained upon the idea that the debt is gone and there is nothing, therefore, to support or justify the execution of the power. This court has said that the statute of limitations is a statute of repose. It suspends the remedy, but does not cancel the debt. Capehart v. Dettrick, 91 N. Car. 351, 352.

If this supposed analogy between a proceeding to foreclose a deed of trust by advertisement and sale and a suit in court for that purpose does exist, and the principles which govern a suit in court upon a cause of action which is barred, are applied to the facts of this case, we find that no attempt was ever made by the defendants to plead the statute before the sale or otherwise to obtain the benefit of it, and the case, therefore, must stand, if the analogy is carried out to its legitimate consequences, just as if a suit had been brought, judgment of foreclosure rendered, and a sale made and confirmed, so that the matter is finally closed and at an end, without the interposition in due time of any plea of the statute. Can it be said that a party under such circumstances may avail himself of the statute? While a party must be diligent in prosecuting his action in order to enforce his rights, or else be barred when sufficient time has elapsed for that purpose after the cause of action accrued, the other party who seeks to avail himself of this lapse of time, must be equally diligent in bringing forward his plea, or he will be deemed to have waived it. We do not mean to imply that there is any way known to the law by which a mortgagor or trustor can avail himself of the statute as against a mortgagee or trustee who is attempting to execute the power under the deed of trust by what have been called "proceedings *in pais*," instead of resorting to a suit in court. Indeed, such a right in the mortgagor or trustor to benefit by the statute under such circumstances has been held not to exist. In Grant v. Burr, 54 Cal. 298, the court decides that the running of the statute for the full period of limitation "does not operate as an extinguishment or payment," and, when the legal title to land has been conveyed to a trustee to secure a debt, the power and title of the trustee are not affected by the expiration of the time prescribed to bar the debt, and a court of equity will not interpose to enjoin a sale under the deed. The statute of limitations is to be employed as a shield, and not as a sword; as a weapon of defense, not a weapon of attack. In other words, the statute of limitations, by the very language of our Code, is made the subject of a defensive plea only, and is required, therefore, to be specifically set up in that way in an action on the debt or deed of trust. "The objection that the action was not commenced within the time limited can only be taken by answer." Clark's Code (2d Ed.), § 138, and cases cited. It is never the proper basis of an action in which affirmative relief is sought. 19 Am. & Eng. Enc. (2d Ed.) p. 178; Moline Plow Co. v. Webb, 141 U. S. 616, 12 Sup. Ct. 100, 35 L. Ed. 879. It is true a title to property may be acquired by adverse possession, but that is by express provision of the statute, and the statute is not then pleaded *eo nomine*, but the title or ownership is asserted or denied, as the case may be, and proof of a sufficient adverse possession may be offered to sustain the allegation or denial. The plea of the statute is not proper in such a case. Mfg. Co. v. Brooks, 106 N. Car. 107, 11 S. E. Rep. 456; Cheatham v. Young, 113 N. Car. 161, 18 S. E. Rep. 92, 37 Am. St. Rep. 617.

It has been suggested that the principle upon which such statutes are founded is the one taken from the civil law, by which a presumption of payment or release arises from the lapse of time. Mr. Wood, in discussing this question, says: "Whatever may formerly have been thought to be the ground upon which these statutes are based, it is now quite generally conceded that their purpose was, and is, to compel the settlement of claims within a reasonable period after their origin, and while the evidence upon which their enforcement or resistance rests is fresh in the minds of the parties or their witnesses, and that there is no presumption to be raised, either as to payment or otherwise, from the mere lapse of the statutory period, more than would naturally arise as to any stale demand." 1 Wood on Limitations (1893), § 5. The statute of presump-

tions has been repealed, and for it has been substituted the statute of limitations, as a statute of repose, which bars the remedy only.

But there is another reason why the statute cannot avail the defendant either directly or indirectly: It is provided in the deed of trust that the debtor may have one year within which to pay one-half of the debt, and if that one-half is paid at maturity, then another year to pay the other half. The provision is not in principle unlike the one in the deed which was construed in Capehart v. Dettrick, *supra*. In that case it appeared that a series of notes had been given and secured by a deed of trust in which it was provided that, if the debtor failed to pay any one of the series, all the notes should become immediately due and payable, and this court held that it was optional with the creditor whether or not he would avail himself of the right to accelerate the payment of the notes not actually due by their terms. The same principle was declared in Barbee v. Scoggins, 121 N. Car. 135, 28 S. E. Rep. 259, and in that case it was further held that the failure of the creditor to exercise the option did not set the statute in motion. So, in our case, while the extension of payment of half the debt for two years was made to depend upon the payment of the other half at the expiration of the first year, the plaintiff could waive the benefit of the condition, or the payment of the first half of the debt, and elect to wait until the end of the two years for the payment of the entire amount. The case of Parker v. Banks, 79 N. Car. 481, 488, would seem to be directly in point. In that case the court (Bynum, J.) says: "The condition of the mortgage was a continuing one—to pay in installments, at several times—and the mortgagee could await the maturity of the last note before an entry and sale, or elect to treat the non-payment of the first or any subsequent note at maturity as a forfeiture of the mortgage. * * * This doctrine of election to waive or enforce a forfeiture is discussed in Towle v. Ayer, 8 N. H. 57, and in Angell on Limitations, 470, and notes. The exercise of the right of election was a matter within the sound discretion of the mortgagee, to be determined by a prudent consideration of the interests of the parties to the trust, and his action is binding upon a mere volunteer claiming as a purchaser with full notice." In Capehart v. Dettrick and Barbee v. Scoggins, *supra*, the court held that the mortgagee or trustee had an option to sell, though, by the terms of the deeds, the entire debt was matured by the failure to pay any part of it. In Cox v. Kille, 50 N. J. Eq. 176, 24 Atl. Rep. 1032, the court says: "It is urged that, because the bond provides that in case interest remains due and unpaid for the space of thirty days, then the principal shall become instantly due and payable, without saying that it shall become so payable at the option of the holder of the bond, the obligor may consider the principal as due and discharge the bond. In other words, the claim is that the obligor, by means of his own default, may exercise the option, which most evidently the parties intended to give only to the obligee. Authorities need not be cited in support of the general doctrine that equity will not permit a party to take advantage of his own wrong. The principle, however, has frequently been applied when courts have been called upon to determine the rights between landlords and tenants, under similar circumstances. It is entirely optional with the lessor whether he will avail himself of this right of re-entry or not, although, by the terms of the proviso, the term is to cease or become void for the non-performance of the covenants; and, if the lessor does not avail himself of it, the term will continue, for the lessee cannot elect that it shall cease or be void."

In construing a similar provision in a mortgage, the court, in Lowenstein v. Phelan, 17 Neb. 430, 22 N. W. Rep. 561, said: "The provision, however, is for the benefit of the mortgagee, to enable him to procure the money loaned at the time it was agreed to be paid. If the mortgagee so desires, he may institute an action upon default to foreclose, and, upon obtaining a decree, have the premises sold. He need not do so, however. The stipulation being made for his benefit, he may waive it without putting himself in default."

It follows, therefore, that, if the statute of limitations applies in this case, the right to foreclose was not barred until May 4, 1901, which was after the date of the sale under the power. There was no error in the ruling of the court as to the payments which the plaintiff alleged prevented the running of the statute. The reason why a part payment is allowed to prevent the bar of the statute is that it is deemed an admission of a subsisting liability, from which a promise, as of the date of the payment, to pay the balance of the debt will be implied, but in order to raise this implication there must be a voluntary payment by the debtor or by some one authorized to make the payment for him. The trustee was not so authorized in this case. Battle v. Battle, 116 N. Car. 161, 21 S. E. Rep. 177. Our conclusion is that in no view of the case was the plaintiff's right to recover affected by the statute of limitations, and the court below erred in holding that the plaintiff's cause of action is barred, and in instructing the jury to answer the second and third issues "No."

NOTE.—*Whether a Statute of Limitations Barring Note and Mortgage Affects also a Power of Sale Under a Deed of Trust Given to Secure it.*—One of the most interesting questions in the law relating to the limitation of actions, is discussed in the principal case. Another North Carolina case, decided at the same term of court, discusses one phase of this case more fully, but we have selected the principal case for publication in full, because it is a later decision in affirmance of the former and discusses the question from every standpoint.

In the case of Menzel v. Hinton, 44 S. E. Rep. 385 the former decision alluded to, the Supreme Court of

North Carolina held that where a mortgage contains a power of sale, the right of the mortgagee to foreclose by execution of the power is unlimited as to time, Code 1883, § 152, prescribing a 10-year limitation for an action to foreclose a mortgage or deed of trust, having no application to a sale under the power, but applying only to actions. This decision encountered the dissent of two of the judges of the court and is certainly the most clear-cut decision upon this particular point in the books. We quote from the arguments all the essential points advanced by the majority of the court in favor of its decision. Speaking through Connor, J., the court says:

"The Code of 1883, § 152 provides that the period prescribed for the commencement of 'an action for the foreclosure of a mortgage or deed of trust for creditors with a power of sale of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale becomes absolute, or within ten years after the last payment on the same.' We are unable to discover in this language any period of time fixed within which the mortgagee is required to execute the power of sale. It will be observed that this section prescribes the time for bringing an action (1) for the foreclosure of a mortgage, or (2) deed in trust for creditors, with power of sale. The instrument executed by Foreman to Hinton is a mortgage containing a power of sale, and is not within the language of the statute. It was not necessary for the mortgagee to institute an action for the foreclosure of the mortgage or the execution of the power; hence, no time is fixed by the statute within which he must execute the power. The word 'action' in the paragraph evidently has reference to the action for foreclosure, and not to the execution of the power of sale, which requires no action. To construe the statute otherwise, would be to write into it language which we do not find there."

After discussing the authorities from its own state, and practically overruling the case of Hutaff v. Adrian, 112 N. Car. 259, in which a different rule was laid down, the court proceeds as follows:

"As we have said, a mortgage containing a power of sale not being within the words of the statute, and therefore, the execution of the power not being affected thereby, we can see no reason why the mortgagee may not execute the power at any time. The debt being in existence, unpaid, no court of equity would enjoin the execution of the power upon the theory that there was a presumption of payment of the debt. It is conceded that if it were necessary for the mortgagee to bring an action to invoke the equitable aid of the court to foreclose his mortgage after the expiration of 10 years from the last payment on the debt, the mortgagor being in possession, he would be barred, because in that event he would abandon his power of sale and ask for the intervention of the court, which would be compelled to enforce the statutory bar. The point upon which we rest our decision is that, as the mortgagor has expressly put it in the power of the mortgagee to sell the land for the payment of the debt, and thereby relieved him of the necessity of bringing an action for that purpose, his right is not affected by the statute of limitations, which applies only to actions brought for the enforcement of rights. The legislature may, if in its wisdom it should see fit, place the execution of the power of sale, in respect to the time within which it must be exercised, upon the same footing as actions to foreclose a mortgage with power of sale; but we cannot, in the absence of any legislative declaration, make the law."

In dissenting from the decision in the case from which we have just quoted, Clark, C. J., argues as follows: "There is no statute of limitations against the execution of a power of sale, and none is needed. It is a mere power of attorney. When either payment or the statute of limitations can be, and is, set up to the debt and mortgage, the execution of the power of attorney is a nullity, for the debt and mortgage have lost their validity, provided the defense is pleaded at the first opportunity. This opportunity may be afforded by an action of ejectment brought by the purchaser, or it may be set up by the mortgagor himself, either in an action for an injunction before the sale, or in an action to remove cloud upon title after the sale, as in this case. It is true that the mortgage is not necessarily barred when the debt is, but, when the bar of the statute of limitations can be successfully pleaded to the mortgage, the power of sale (which is a mere power of attorney to dispense with the formality of an action and judgment of foreclosure) is barred because it has nothing to act upon. Powers of sale are not favorites of the law (Mosby v. Hodge, 76 N. Car. 387), and it would be exceeding strange if, when by reason of the statute of limitations an action cannot be maintained to foreclose the mortgage, a power of attorney to sell without formal decree of foreclosure should put vitality into a mortgage upon which a court is powerless to decree foreclosure."

We believe both reason and authority sustain the decision of the majority of the court in the principal case. It is well known that when the mortgagee is in possession, he may retain possession until the debt is paid. Although the right to proceed by action on both the note *and the mortgage* is barred, still, if the mortgagee can obtain rightful possession of the premises, he may retain them until the debt is paid. Jones on Mortgages, sec. 1204; Henry v. Mining Co., 1 Nev. 619; Phyfe v. Riley, 15 Wend. (N. Y.) 248, 30 Am. Dec. 55. It would seem plain, therefore, that a mortgagee, although his right to sue on the mortgage was gone, could exercise the right given him by the mortgagor (irrevocable because coupled with an interest) to sell the land at any time after default and before payment. There are many rights which are recognized by men, which the courts have been given no power to enforce; these are termed imperfect rights. There are two ways of taking such rights out of the class of imperfect rights and putting them in the class of perfect rights,—1st, where the legislature provides a remedy for their enforcement, or 2d, where the parties themselves provide a special remedy by contract. A power of sale in a deed of trust securing a mortgage is a remedy coming within this latter class and originated out of the demand of a large class of real property owners and money lenders to provide a cheaper remedy than that provided by law—the foreclosure suit. The legislature failing to provide a remedy, the parties provided one of their own choosing. If such remedy is sometimes a harsh one, it is certainly not the fault of the law; the parties have only themselves to blame. Unless every contract is to be declared invalid because of harsh results it happens to produce, a deed of trust giving an unlimited power of sale should not be excepted.

If, therefore, the contract giving such power is a valid one, we have only to determine whether the statute of limitations has any effect on the exercise of the power of sale. It is well understood that the

statute of limitations generally refers only to actions or suits to enforce a remedy. They generally commence, "No action for," etc. "The declaration," says Stayton, J., in Goldfrank v. Young, 64 Tex. 432, "that persons must institute 'suits or actions in courts' within a fixed period to enforce their claims, which can be enforced only in that manner, is not equivalent to declaring that a creditor, who has been given by contract a right and means by which he may enforce his claims otherwise than through the courts, shall not enforce it after the time at which he might institute an action or suit, without subjecting himself to the bar which would be urged by a plea of limitation. It is not always true that rights which cannot be enforced through the courts are valueless, nor that contracts which the courts cannot enforce are invalid."

Of course there are many authorities on the point that the remedy on the mortgage is not barred though action on the note or other collateral debt be barred. This, however, as we have seen, is not the question before us. Our case is one where the remedies on both the note and mortgage are barred. The following cases sustain the decision reached in the principal case holding that no limitation runs against a power of sale in a trust deed: Grant v. Burr, 54 Cal. 298; Hayes v. Frey, 54 Wis. 503, 11 N. W. Rep. 695; Bush v. Cooper, 26 Miss. 599, 59 Am. Dec. 270; Goldfrank v. Young, 64 Tex. 432. See also Moline Plow Co. v. Webb, 141 U. S. 616; Gardner v. Terry, 99 Mo. 523.

JETSAM AND FLOTSAM.

ASSOCIATE JUSTICE BREWER'S PLEA AGAINST LYNCHING.

Associate Justice David J. Brewer of the Supreme Court of the United States has contributed to Leslie's Weekly an article on the crime of lynching, in the course of which he says: "Our government recently forwarded to Russia a petition in respect to alleged atrocities committed on the Jews. That government, as might have been expected, unwilling to have its internal affairs a matter of consideration by other Governments, declined to receive the petition. If, instead of so doing, it had replied that it would put a stop to all such atrocities when this Government put a stop to lynchings, what could we have said?

"It is well to look the matter fairly in the face. Many good men join in these uprisings, horrified at the atrocity of the crime and eager for swift and summary punishment. Of course, they violate the law themselves, but rely on the public sentiment behind them for escape from punishment. Many of these lynchings are accompanied by the horrible barbarities of savage torture, and all that can be said in palliation is the atrocity of the offenses which led up to them. For a time they were confined largely to the South, but that section of the country no longer has a monopoly.

"The chief offense which causes those lynchings has been the rape of white women by colored men. No words can be found too strong to describe the atrocity of such a crime. It is no wonder that the community is excited. Men would disgrace their manhood if they were not. And if a few lynchings had put a stop to the offense, society might have condoned such breaches of its law; but the fact is, if we may credit the reports, the crime, instead of diminishing, is on the increase. The black beast (for only a beast would be guilty of such an offense) seems to be not deterred thereby. More than that, as might be expected, lynching for such atrocious crimes is no longer confined to them, but is being resorted to for other offenses.

"What can be done to stay this epidemic of lynching? One thing is the establishment of a greater confidence in the summary and certain punishment of the criminal. Men are afraid of the law's delays and the uncertainty of its results. Not that they doubt the integrity of the Judges, but that they know the law abounds with technical rules and that appellate courts will often reverse a judgment of conviction for a disregard of such rules, notwithstanding a full belief in the guilt of the accused.

"If all were certain that the guilty ones would be promptly tried and punished the inducement to lynch would be largely taken away. In an address which I delivered before the American Bar Association at Detroit some years since, I advocated doing away with appeals in criminal cases. It did not meet the favor of the association, but I still believe in its wisdom.

"For nearly a hundred years there was no appeal from the judgment of conviction of criminal cases in our Federal Courts, and no review except in a few cases in which, two Judges sitting, a difference of opinion on a question of law was certified to the Supreme Court. In England the rule has been that there was no appeal in criminal cases, although a question of doubt might be reserved by the presiding Judge for the consideration of his brethren. Honorable E. J. Phelphs, who was Minister to England during Mr. Cleveland's first administration, once told me that while he was there only two cases were so reserved. Does any one doubt that justice was fully administered by the English courts?

"It is in extenuation of lynching in case of rape that it is an additional cruelty to the unfortunate victim to compel her to go upon the witness stand and in the presence of a mixed audience tell the story of her wrongs, especially when she may be subject to cross-examination by overzealous counsel. I do not belittle this matter, but it must be remembered that often the unfortunate victim never lives to tell the story of her wrongs, and if she does survive she must tell it to some, and the whole community knows the fact.

"Even in the courtroom any high-minded Judge will stay counsel from any unnecessary cross-examination, and finally, if any lawyer should attempt it the community may treat him as an outcast. I cannot but think that if the community felt that the criminal would certainly receive the punishment he deserves, and receive it soon, the eagerness, for lynching would disappear, and mobs, whose gatherings too often mean not merely the destruction of jails and other property, but also the loss of innocent lives, would greatly diminish in number.

"One thing is certain, the tendency of lynching is to undermine respect for the law, and unless it be checked we need not be astonished if it be resorted to for all kinds of offenses and oftentimes innocent men suffer for wrongs committed by others."

RESTRAINING PROSECUTION OF ACTION BROUGHT IN ANOTHER STATE.

Will the courts of one state, having jurisdiction over the person of a defendant, enjoin him from bringing or prosecuting an action in another state? Generally speaking they will, when, by so doing, more complete justice can be done between the parties. In Locomobile Co. of America v. American Bridge Com-

pany of New York (1903), 80 N. Y. Supp. 288, such an injunction was granted, the court being convinced, in view of the circumstances of the case, that better justice could be done in New York than in Connecticut.

The question is at best one of policy. For, having once obtained jurisdiction, a court of equity can, by acting *in personam*, prohibit the inequitable acts of either party. But the propriety of exercising this power, when its exercise indirectly interferes with the courts of independent states, has been the cause of much difference of opinion.

In England both the power and the propriety were formerly doubted. In Lowe v. Baker (1692), 2 Freem. 125, Lord Clarendon refused to grant the injunction on the ground that the court had no authority to bind a foreign court. The reporter, however, throws doubt on his conclusion by adding "*Sed quære*, for all the bar was of another opinion?" This doubt was finally dispelled by Lord Brougham in Portarlington v. Soulby (1834), 3 Myl. & K. 104, in which he reviews the whole subject, points outthat the court is only commanding the obedience of the defendant, and declares that the power should be exercised whenever justice demands it.

In the United States the subject assumes several aspects. On the one hand there is danger of conflict between the courts of different states, and on the other of conflict between state and federal courts. And in each of these there arise two questions: 1st. Is such an interference in accord with the spirit of comity that should exist? 2d. Does such an injunction contravene the full faith and credit clause of the federal constitution? (Const. Art IV. Sec. 1)

Considering these in the order named, we find in early times a strong tendency on the part of the courts of one state to refuse to interfere, even in this indirect manner, with the courts of other states. Boyd v. Hawkins (N. Car., 1833), 2 Dev. Eq. 229. New York was probably the stongest exponent of the doctrine and Mead v. Merritt (1831), 2 Paige, 402 is cited by all its advocates. In that case Chancellor Walworth says: "I am not aware that any court of equity in the Union has deliberately decided that it will exercise the power, by process of injunction, of restraining proceedings which have been previously commenced in the courts of another state." This case was followed in Williams v. Ayrault (1860), 31 Barb. 364, and Harris v. Pullman (1876), 84 Ill. 20, and was interpreted as laying down an iron-bound rule of policy. But this interpretation may be doubted in the light of another case decided also by Chancellor Walworth, Burgess v. Smith (1847), 2 Barb. Ch. 276, and of a long line of cases in New York and elsewhere, in which the courts refuse to be bound in this absolute manner.

In Vail v. Knapp (1867), 49 Barb. 299, the court say: "While as a general rule, the propriety of which is apparent, the courts of this state decline to interfere by injuction to restrain its citizens from proceeding in an action which has been commenced in the courts of a sister state, yet there are exceptions to this rule and when a case is presented fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction to prevent oppression or fraud." This si a fair expression of the present policy of the courts of this country as well as of England. 2 Story Eq.Jur. §§ 899, 900; Dehon v. Foster (1862), 4 Allen, 545; Eag v. Scheuerman (1869), 40 Ga. 206; Snook v. (Snetzer 1874), 25 Ohio St. 516; Keyser v. Rice (1877), 47 Md. 203; Allen v. Buchanan (1892), 97 Ala. 399.

The constitutionality of such proceedings has been doubted, but that phase of the question was settled by Cole v. Cunningham (1889), 133 U. S. 107, in which the supreme court upheld the injunction, recognizing the essential distinction between a court's refusing to give credit to the decrees of another court, and a court's exercising its power to restrain an individual.

On principle the same conclusions should be reached in conflicts between state and federal courts. Such has not been the case. Judiciary Act 1793 (incorporated in Revised Statutes U. S. § 720), prohibited federal courts from granting injunctions to stay proceedings in state courts, except where authorized by bankrupt laws. This, however, has been construed to apply only to cases in which the state court had first obtained jurisdiction. Fisk v. Union Pacific Ry. Co. (1873), 10 Blatchf. 518; French v. Hay (1874), 22 Wall. 250. Thus far the only inconsistency in the results has been created by statute. The real inconsistency is met with when we consider the reverse of the proposition, viz.: the right of a state court to interfere in federal proceedings. It hws been broadly stated that the state court has no such right. Riggs v. Johnson Co. (1867), 6 Wall. 166. This can only be supported on the ground of public policy, which recognizes the danger of conflict between state and federal courts, growing out of that peculiar concurrent jurisdiction. Even granting that possibility, the better reasoning would seem to allow the injunction against a litigant in a federal court as well as in a sister state court. Ackerly v. Vilas (1862), 15 Wis. 440; Home Insurance Co. v. Howell (1873), 24 N. J. Eq. 238.—*Columbia Law Review.*

HUMOR OF THE LAW.

"I am innocent, and I can prove it if you will give me time," whined the old offender. "Three years," said the judge.

An amusing story is being told among lawyers of a Walloon peasant who had gone to law with a neighbor. In conversation with his lawyer, he suggested sending the magistrate a fine couple of ducks.

"Not for your life," said the adviser. "If you do you'll lose the case."

The judgment was given in his favor, when he turned to his lawyer and said: "I sent the ducks." Astonishment on the lawyer's part turned to admiration when his client continued: "But I sent them in my neighbor's name."

There is a justice of the peace in a certain town in Iowa, more or less learned in the law. A short time ago the parents of a boy who had for some time been living with some elderly ladies in the town, desired the boy to return to the parental home. The boy preferred to remain where he was and the ladies were of the same mind, and failing to induce the boy to return home, the parents appealed to the justice for some legal remedy which he was supposed to keep on hand for such occasions. The justice was equal to the occasion and said, "O, that's easy; I'll just issue a search warrant for the boy." The warrant was accordingly issued and placed in the hands of the constable who promptly made the search, discovered the small boy and bore him away to the justice. The question then arose as to what was to be done with

the boy, and again the justice was equal to the proposition. "I'll just turn him over to his parents," he said. "If the other parties want him, let 'em replevin him."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. ACCIDENT INSURANCE—Warranty.—It is not a breach of a warranty of physical soundness in an application for accident insurance that the applicant's leg is slightly curved, and therefore more susceptible to inflammation from future accidents than a normal leg would be.—Maryland Casualty Co. v. Gehrmann, Md., 54 Atl. Rep. 678.

2. BAILMENT—Sale. — Where there is an agreement between the sender of goods and the receiver that the latter is to sell the goods and account for the proceeds, he becomes a mere bailee of the goods. — Furst Bros. v. Commercial Bank, Ga., 43 S. E. Rep. 728.

3. BANKRUPTCY — Action on Account. — A discharge in bankruptcy must be pleaded to be available as a defense. —Bailey v. Kraus, 81 N. Y. Supp. 492.

4. BANKRUPTCY — Discharge.—A court is bound to take notice of a discharge in bankruptcy under the national bankruptcy act of 1898, when pleaded. — Wood v. Carr, Ky., 73 S. W. Rep. 762.

5. BENEFIT SOCIETIES — Fines.—Notice of fine to member of unincorporated benevolent society held necessary to work a forfeiture of member's rights. — Leahy v. Mooney, 81 N. Y. Supp. 360.

6. BILLS AND NOTES—Bona Fide Purchaser.—*Bona fide* purchaser of note, who has discounted the same to bank and takes it up on dishonor, assumes the position of bank as a *bona fide* purchaser. — Coyne v. Anderson's Exrs., Ky., 73 S. W. Rep. 753.

7. BILLS AND NOTES—Indorsement Without Recourse. —An indorsement "without recourse" on a purchase-money note, in which titles to the property was reserved, does not carry such title to the indorsee. — Bradley v. Cassels, Ga., 43 S. E. Rep. 857.

8. BILLS AND NOTES — Usury.—Fact that payee of note had boarded with one to whom he sold the note held not to justify inference that the latter knew of the usury therein.—McWhirter v. Longstreet, 81 N. Y. Supp. 334.

9. BILLS AND NOTES—Validity of Assent.—Drawer of a check in payment of a deposit required at an auction sale of a trustee in bankruptcy held not relieved from liability on the check because both the trustee and the drawer believed that the check was a loan to an alleged principal of the purchaser at the sale. — Levy v. Huwer, 81 N. Y. Supp. 191.

10. BUILDING AND LOAN ASSOCIATIONS — Usury. — In suit by receiver of insolvent building association against member in default, dues and interest paid by such member on usurious contract must be credited on principal sum due.—Carpenter v. Lewis, S. Car., 43 S. E. Rep. 881.

11. CARRIERS — Authority of Station Agent.—A station agent may bind railroad by verbal contract to furnish freight cars at a given time. — Gulf, C. & S. F. Ry. Co. v. Irvine & Woods, Tex., 73 S. W. Rep. 540.

12. CARRIERS — Elevators. — There is no distinction in law between the duties and liabilities of a carrier by elevator and one by railroad. — Becker v. Lincoln Real Estate & Building Co., Mo., 73 S. W. Rep. 581.

13. CARRIERS — Injury to Passenger.—A street railway held not liable to one who, trying to catch a car, falls over a stump in the street around which the company had built a platform. — Lucas v. St. Louis & S. Ry. Co., Mo., 73 S. W. Rep. 589.

14. CARRIERS — Negligence. — Negligence of railroad, resulting in injury to passenger, held to be so gross as to make almost any kind of error in the charge on negligence immaterial. — Central Texas & N. W. Ry. Co. v. Smith, Tex., 73 S. W. Rep. 537.

15. CARRIERS — Opportunity to Buy Ticket. — Where a passenger does not buy a ticket when opportunity is given, a railroad company has no right to charge excess fare and give rebate checks therefor between points within the state. — Weber v. Southern Ry. Co., S. Car., 43 S. E. Rep. 888.

16. CARRIERS — Transportation of Employees. — Rules of a street car company held to apply only to employees riding free, and not to justify an assault on an employee paying fare, in ejecting him from a seat he was not otherwise entitled to occupy.—Rowe v. Brook yn Heights R. Co., 81 N. Y. Supp. 106.

17. CIVIL RIGHTS—Bootblack Stand.—Under Laws 1895 ch. 1042, § 1, a bootblacking stand in the corridor of an office building held a "place of public accommodation," within the act.—Burks v. Bosso, 81 N. Y. Supp. 384.

18. COMMERCE — Peddler's License. — Pen. Code, § 600, making it a misdemeanor for a peddler to sell goods without a license, is not operative against one engaged in interstate commerce. — Stone v. State, Ga., 43 S. E. Rep. 740.

19. COMPROMISE AND SETTLEMENT — Defenses. — One who has compromised a doubtful claim cannot subsequently escape payment by showing the claim was invalid.—Cowen v. Rouss, 81 N. Y. Supp. 276.

20. CONSTITUTIONAL LAW — Railroad Commission. — Rev. St. 1895, arts. 4565, 4566, authorizing review by the court of a freight rate made by the railroad commission, held not to confer legislative power on the court, contrary to the constitution. — Railroad Commission of Texas v. Weld & Neville, Tex., 73 S. W. Rep. 529.

21. CONSTITUTIONAL LAW—Vested Right in Office.—No man has a vested right to an office created by the legislature, but that body may legislate him out of such office at its will.—Dallis v. Griffin, Ga., 43 S. E. Rep. 758.

22. CONTRACTS — Consideration. — Submission to arbitration is sufficient consideration to support a note given in pursuance of the award. — Downing v. Lee, Mo., 73 S. W. Rep. 721.

23. CONTRACTS — Mistake. — Where a mistake in the making of a contract is patent, and the opposite party knew of it, or should have known of it, no contract has been made capable of enforcement. — Singer v. Grand Rapids Match Co., Ga., 43 S. E. Rep. 755.

24. CONTRACTS — Mortgage.—Where a mortgage under seal was not paid at maturity, a subsequent parol agreement extending the time of payment and increasing the rate of interest held a valid modification thereof.—New York Life Ins. Co. v. Casey, 81 N. Y. Supp. 1.

25. CONVICTS—Private Chain Gangs.—Convicts cannot be worked in private chain gangs controlled by private individuals. — Simmons v. Georgia Iron & Coal Co., Ga., 43 S. E. Rep. 780.

26. CORPORATIONS — Accounting by Directors.—Equity can compel directors of a corporation to account, either on the theory of waste, gross negligence, or other wrongful acts, and protect a stockholder in the meantime by injunction.—Moneuse v. Riley, 81 N. Y. Supp. 325.

27. CORPORATIONS — Amendment of Petition.—A petition filed in the name of Adas Yeshurun Society may be amended, so as to show that plaintiff was a corporation. —Adas Yeshurun Soc. v. Fish, Ga., 43 S. E. Rep. 715.

29. CORPORATIONS — Insolvency.—Judgment creditor held not entitled to enforce supplementary proceeding under insolvent assessment insurance company, dissolved because of insolvency and having no corporate existence.—*In re* Stewart, 81 N. Y. Supp. 209.

29. COSTS — Extra Allowance.—An extra allowance for attorney's fees, on the report of referee to take testimony on the amount of attorney's fees, cannot be given, when no costs are allowed to party asking the allowance.—Frost v. Reinach, 81 N. Y. Supp. 246.

30. COURTS—Jurisdiction.—Where equity has obtained jurisdiction by reason of the residence of one of several codefendants, such jurisdiction is not lost by his death or resignation. — Lofton v. Collins, Ga., 43 S. E. Rep. 708

31. COVENANTS—Tenement House.—A modern apartment house held not a tenement house, within a restriction in a deed executed in 1873, prohibiting the construction of tenement houses on the property.—White v. Collins Bldg. & Const. Co., 81 N. Y. Supp. 484.

32. CRIMINAL EVIDENCE—Instruction.—Where accused in his statement made no pretense of having been insane, but asserted that he attempted the murder in a spirit of revenge, a refusal to instruct on the law of delusional insanity was not error.—Adams v. State, Ga., 43 S. E. Rep. 703.

33. CRIMINAL TRIAL — Review on Appeal. — Where accused moved for a new trial on the ground that he was not present when the court recharged the jury, the certificate of the judge must show that the prisoner was not present.—Brice v. State, Ga., 43 S. E. Rep. 715.

34. CRIMINAL TRIAL—Suspension. — The suspension of a criminal trial to receive the presentment of the grand jury is no cause for a new trial.—Clark v. State, Ga., 43 S. E. Rep. 853.

35. DAMAGES—Evidence.—In a personal injury action, evidence of increased susceptibility to disease held admissible.—Rea v. St. Louis Southwestern Ry. Co., Tex., 73 S. W. Rep. 555.

36. DEATH—Age of Decedent's Father.—On an assessment of damages for negligent death, evidence of the length of life of deceased's father was inadmissible.—Hinsdale v. New York, N. H. & H. R. Co., 81 N. Y. Supp. 356.

37. DEEDS—Burden of Proof. — Where, in trespass to try title, affidavit of forgery is filed by plaintiff, burden of proving execution of deed is on defendant and remains there.—Williamson v. Gore, Tex., 73 S. W. Rep. 563.

38. DEEDS—Signature.— Deed reciting that "I, J. R., sign my hand to it X here," held sufficiently signed, within Civ. Code 1895, § 3599.—Horton v. Murden, Ga., 43 S. E. Rep. 786.

39. DEPOSITIONS—Commissioner.—It is no objection to subpœna to appear to testify as to a case pending in a foreign state that the commissioner is a nonresident.—*In re* Canter, 81 N. Y. Supp. 338.

40. DESCENT AND DISTRIBUTION — Liability of Heirs.—Heirs take property of an ancestor subject to its liability for omitted taxes, the collection of which is not barred by limitations. — Commonwealth v. Sweigart's Adm'r, Ky., 73 S. W. Rep. 758.

41. DISCOVERY—Examination by Physician.—In action for injuries, a motion during trial that plaintiff submit a sample of his urine for examination by physicians to be appointed by the court held too late. — Austin & N. W. R. Co. v. Cluck, Tex., 73 S. W. Rep. 569.

42. DIVORCE—Tenants in Common. — A husband and wife, after divorce, became tenants in common of the community property, and either may recover the entire interest as against a trespasser. — Williamson v. Gore, Tex., 73 S. W. Rep. 563.

43. EASEMENTS—Dedication. — Owner of land abutting on strip designated as alley in plat held entitled to the use of the same as appurtenant to his property.—Douthitt v. Canaday, Gillium & Key, Ky., 73 S. W. Rep. 757.

44. EASEMENT—Merger of Estates.—Easement in spring of water extinguished by merger of dominant and servient estates, because of agreement.—Riehlman v. Field, 81 N. Y. Supp. 239.

45. EJECTMENT—Right to Maintain.—The owner of an undivided half interest in the equity to certain land cannot maintain ejectment against one holding the legal title.—Nalle v. Thompson, Mo., 73 S. W. Rep. 599.

46. ELECTRICITY — Negligence Causing Death. — The fact of death from contact with electric wires at a place where deceased had a right to be, held conclusive proof of defective insulation and of the negligence of defendant.—Geismann v. Missouri-Edison Electric Co., Mo., 73 S. W. Rep. 654.

47. EMINENT DOMAIN—Filing of Profile.—The filing of a proper profile in condemnation proceedings is a condition precedent to the granting of an order of condemnation.—Kinston & C. R. Co. v. Stroud, N. Car., 43 S. E. Rep. 913.

48. EVIDENCE—Admissibility. — A witness cannot testify without qualification that another acted in good faith and without notice. — Durrence v. Northern Nat. Bank, Ga., 43 S. E. Rep. 726.

49. EVIDENCE—Age of Witness —The court held not bound to believe the uncontradicted statement of an interested party to an action as to his age. — Levy v. Abramsohn, 81 N. Y. Supp. 344.

50. EVIDENCE — Expert Testimony. — Expert in shipping cattle could testify as to necessity for feeding them at certain point.—Gulf, C. & S. F. Ry. Co. v. Irvine & Woods, Tex., 73 S. W. Rep. 540.

51. EVIDENCE—Plat of Land. — A plat of land held not admissible, as independent evidence, on mere testimony of one who was with the surveyor. — Smith v. Bunch, Tex., 73 S. W. Rep. 559.

52. EVIDENCE — Sales. — Contemporaneous writing, modifying a written order for goods, held admissible.—Eastern Mfg. Co. v. Brenk, Tex., 73 S. W. Rep. 538.

53. EXCHANGES—Erroneous Suspension.—Members of a coffee exchange held not liable to a member for damages to his business reputation by his erroneous suspension, in the absence of malice.—Lurman v. Jarvie, 81 N. Y. Supp. 468.

54. EXECUTORS AND ADMINISTRATORS — Allowance by Probate.—An allowance of a claim by a probate court cannot be collaterally attacked in a suit to set aside as fraudulent a conveyance by deceased. — Clark v. Thias, Mo., 73 S. W. Rep. 616.

55. EXECUTORS AND ADMINISTRATORS — Burial Lot.—An executrix cannot be allowed the expense of procuring a burial lot and monument, where testator in his lifetime provided one himself. — *In re* Woodbury's Estate, 81 N. Y. Supp. 503.

56. EXECUTORS AND ADMINISTRATORS — Liability of Husband's Estate.—Counsel fees awarded in wife's action for separation held collectible from the deceased husband's estate.—Kellogg v. Stoddard, 81 N. Y. Supp. 271.

57. FACTORS — Broker's Conversion. — A factor into whose hands cotton passes, which has been sold for cash, but has not been paid for, is chargeable with the conversion, though it be sold in due course of trade and in entire good faith.—Flannery v. Harley, Ga., 43 S. E. Rep. 765.

58. FALSE IMPRISONMENT—Arrest by Servant.—A master held liable for a false arrest caused by his servant in his master's business, though private instructions were departed from.—Simmon v. Bloomingdale, 81 N. Y. Supp. 499.

59. FIRE INSURANCE—Action for Use.—Where one enters into an executory contract for the sale of a house and lot, and takes out a policy of insurance, and the vendor settles with the company, he cannot thereafter sue for the use of the vendee.—Wright v. Continental Ins. Co., Ga., 43 S. E. Rep. 700.

60. FIRE INSURANCE—Insurable Interest.—A complaint in an action on a fire policy is demurrable, if showing no

insurable interest in the policy holder. — Bryan v. Farmer's Mut. Indemnity Assn., 81 N. Y. Supp. 145.

61. FIRE INSURANCE—Scope of Policy.—Goods stored with one are within the insurance policy taken out by him on goods "held in trust"—Southern Cold Storage Co. v. Dechman & Co., Tex., 78 S. W. Rep. 545.

62. FORCIBLE ENTRY AND DETAINER—Right to Maintain Action.—Although a lessee has not settled on that part of the premises which his lessor claims under a junior patent, he can maintain forcible entry against a stranger to the elder title who attempts to take possession thereunder.—Kirby v. Scott, Ky., 78 S. W. Rep. 749.

63. FRAUD—Credit.—The fact that some of the goods obtained on credit by false representations were obtained six months after the credit was induced is no defense to an action for the fraud.—Levy v. Abramsohn, 81 N. Y. Supp. 344.

64. FRAUDULENT CONVEYANCES—Burden of Proof.—While a voluntary conveyance is not fraudulent *per se* against creditors, held, that the grantee has the burden of establishing the circumstances to overcome the presumption.—Clark v. Thias, Mo., 78 S. W. Rep. 616.

65. FRAUDULENT CONVEYANCES—Intention.—In an action to recover goods alleged to have been fraudulently conveyed, an instruction held erroneous as eliminating the question of the fraudulent intention of the parties.—Blom-Collier Co. v. Martin, Mo., 78 S. W. Rep. 729.

66 FRAUDULENT CONVEYANCES—Rights of Grantee.—*Bona fide* grantee in fraudulent conveyance held, on retransfer, entitled to be repaid advances made.—Nichols v. Nichols, 81 N. Y. Supp. 156.

67. GAME—Enforcement of Penalty.—In action to recover penalty for violation of game law, held unnecessary to recite the statute in the complaint.—People v. Bootman, 81 N. Y. Supp. 195.

68. GARNISHMENT—Service of Writ.—Where a garnishment was abandoned, the garnishee in a subsequent action to recover the goods, held entitled to show that the garnishment was not served on the day stated in the return.—Blom-Collier Co. v. Martin, Mo., 78 S. W. Rep. 729.

69. GIFTS—What Constitutes.—Mere declarations of a husband that whoever lives the longest of himself and wife shall have everything do not constitute a gift.—Bauernschmidt v. Bauernschmidt, Md., 54 Atl. Rep. 687.

70. HABEAS CORPUS—Writ to Corporation.—Where, on hearing in *habeas corpus*, it appears that a prisoner was confined in a private chain gang under the control of private individuals, it was proper to remand him to the authorities of the county in which he was sentenced.—Simmons v. Georgia Iron & Coal Co., Ga., 43 S. E. Rep. 780.

71. HOMESTEAD—Interest in Common.—One may acquire a homestead right in property in which she has only an interest in common.—Clark v. Thias, Mo., 78 S. W. Rep. 616.

72. HOMICIDE — Provocation.—The fact that a decedent had previously assaulted and wounded his murderer, and that bitter feeling existed between them, would not justify the latter in lying in wait and killing the decedent.—State v. Rodman, Mo., 78 S. W. Rep. 605.

73. HUSBAND AND WIFE—Separation.—A husband held not liable for necessaries furnished his wife after she had separated from him without his fault and had refused his invitation to return.—Constable v. Rosener, 81 N. Y. Supp. 376.

74. HUSBAND AND WIFE—Surety for Husband.—Where property of a wife was mortgaged to secure a debt of her husband, for which the wife received no benefit, she was liable as a surety only.—White v. Smith, Mo , 78 S. W. Rep. 610.

75. INFANTS—Convicted of Manslaughter.—Boy aged 11 cannot be convicted of manslaughter, without affirmative proof of his capacity to understand his acts.—People v. Squazza, 81 N. Y. Supp. 254.

76. INJUNCTION—Enforcement of Contract.—Equity will not enjoin the enforcement of an unambiguous contract, on the ground that it did not express the real agreement, without first reforming the instrument.—Perkins Lumber Co. v. Wilkinson, Ga., 43 S. E. Rep. 696.

77. INTOXICATING LIQUORS—Establishment of Dispensary.— Where a municipal corporation has power to control the sale of liquors within its limits, it has no authority to organize a dispensary and authorize commissioners to sell liquors.—Lofton v. Collins, Ga., 43 S. E. Rep. 708.

78. INTOXICATING LIQUORS—"Hop Tonic."—In a prosecution for illegal selling, held competent to prove that hop tonic was intoxicating.— Cockerell v. Commonwealth, Ky., 78 S. W. Rep. 760.

79. JUDGMENT—Motion to Open Default.—On a motion to open a default, a copy of the proposed pleading should be annexed to the motion papers.—Schumpp v. Interurban St. Ry. Co., 81 N. Y. Supp. 366.

80. JUDGMENT—Motion to Set Aside.—It is no ground to set aside a judgment that the petition does not show the residence of the defendants, nor that the court had jurisdiction of the person; no objection having been made on that ground before judgment.—Tietjen v. Merchants' Nat. Bank, Ga., 43 S. E. Rep. 730.

81. LANDLORD AND TENANT — Action by Tenant. — Where, after the roof of a building has been destroyed by fire, the landlord guarantees that the goods will not be damaged by rain, the guaranty is void for want of consideration.—Gavan v. Norcross, Ga., 43 S. E. Rep. 771.

82. LANDLORD AND TENANT—Negligence of Sub-contractor.— Landlord held not liable for maintaining a nuisance in the dangerous obstruction of a hallway by servants of a subcontractor.—Boss v. Jarmulowsky, 81 N. Y. Supp. 400.

83. LANDLORD AND TENANT — Subletting.—Where an owner of land rents it to a tenant, who sublets a portion of it for a specific price, the landlord may treat the subtenant as his own tenant, and proceed against him directly by distress warrant.—Barlow v. Jones, Ga., 43 S. E. Rep. 690.

84. LANDLORD AND TENANT—Termination of Lease.— Where a building is destroyed by fire, and the landlord notifies the lessee that he elects not to rebuild, or will build a different kind of structure, the tenant is no longer entitled to possession of the vacant premises.—P. H. Snook & Austin Furniture Co. v. Steiner & Emery, Ga., 43 S. E. Rep. 775.

85. LANDLORD AND TENANT — Wrongful Eviction. — Where the assignee of a lease, under which the rent is payable weekly in advance at the beginning of the week, pays the installment of rent therefor, and during the week is wrongfully evicted, he can recover the whole of the rent for such week.—Mallette v. Hillyard, Ga., 43 S. E. Rep. 779.

86. LARCENY—Fraudulent Conversion.—Where one intrusted with money fraudulently converts it, he is guilty of larceny after trust.—Walker v. State, Ga , 43 S. E. Rep. 701.

87. LIBEL AND SLANDER—Commercial Agency.—Where a commercial agency will express malice circulates a report that a merchant is not in a sound financial condition, the merchant, in an action for damages, is entitled to punitive damages.—Minter v. Bradstreet Co , Mo., 78 S. W. Rep. 668.

88. LIFE INSURANCE—Authority of Broker.—An insurance broker, who has authority to procure insurance, has no authority to surrender the policy and leave his client uninsured.—Birnstein v. Stuyvesant Ins. Co., 81 N. Y. Supp. 306.

89. LIFE INSURANCE—Change of Beneficiary.—Life insurance company held not liable to plaintiff by reason of his failure to obtain its consent to substitution of himself as beneficiary in a policy.—Canavan v. John Hancock Mut. Life Ins. Co., 81 N. Y. Supp. 304.

90. LIMITATION OF ACTIONS—Books of Account.—Entries in account books of a deceased testator of payments received, supported by the executor's oath after the statute of limitations has run, are not admissible to

prove the fact of payment.—Small v. Rose, Me., 54 Atl. Rep. 726.

91. LIMITATION OF ACTIONS — Constructive Fraud.—Constructive fraud will not prevent the running of limitations to a claim growing out of an excessive payment by mistake.—Maxwell v. Walsh, Ga., 43 S. E. Rep. 704.

92. LIMITATION OF ACTIONS—Pleading.—The claim on which a plea in reconvention is based is not barred by limitations, though the plea filed before the claim was barred was defective; it being susceptible of amendment.—Southern Cold Storage Co. v. Dechman & Co., Tex., 73 S. W. Rep. 545.

93. LIMITATION OF ACTIONS — Suspension. — Limitations, having commenced to run against undisclosed agent or trustee, is not suspended by subsequent appearance of married women as principal or *cestui que trust*.—Barden v. Stickney, N. Car., 43 S. E. Rep. 912.

94. MALICIOUS PROSECUTION—Probable Cause.—Failure to prosecute after arrest is insufficient to show want of probable cause in making the arrest.—O'Dell v. Hatfield, 81 N. Y. Supp. 158.

95. MASTER AND SERVANT — Fellow-Servant. — A car starter having authority to direct motormen and conductors of electric cars when to start, held a fellow-servant of such employees.—Sams v. St. Louis & M. R. Co., Mo., 73 S. W. Rep. 686.

96. MASTER AND SERVANT—Hospital for Employees — A railroad company held liable for the negligence of its physician in employing an incompetent nurse to care for a smallpox patient, by whose negligence the disease was communicated to plaintiff's intestate.—Missouri, K. & T. Ry. Co. of Texas v. Freeman, Tex , 73 S. W. Rep. 542.

97. MECHANICS' LIENS—Assignment of Fund.—An order given by a building contractor on the owner and accepted by him is an assignment of the funds in his hands, and is not affected by liens subsequently filed.—Garden City v. Schnugg, 81 N. Y. Supp. 496.

98. MECHANICS' LIENS—Repairs.—One making repairs for the tenant held not entitled to a lien on the premises. —Sunshine v. Morgan, 81 N. Y. Supp. 878.

99. MONOPOLIES—Combinations by Packing Houses.—To constitute the offense of entering into combination to regulate prices, in violation of Rev. St. 1899, §§ 8965, 8966, a complete monopoly or injury to the public is not necessary.—State v. Armour Packing Co., Mo., 74 S. W. Rep. 645.

100. MORTGAGES—Surety for Husband.—Where a wife mortgaged her separate property as surety for her husband and was discharged from liability, she was entitled to rent collected for the mortgagees' use from such property under a contract with her husband.—White v. Smith, Mo., 73 S. W. Rep. 610.

101. NEGLIGENCE—Dangerous Premises. — Where the door of a vacant house is left open, and a young child therein is injured by the fall of a window, which was being raised by his companion, the owner of the house is not liable.—O'Connor v. Brucker, Ga., 43 S. E. Rep. 731.

102. PARTNERSHIP — Accounting. — Where a surviving partner continues the business, the final accounting with the administrator of the decedent should be stated as of the date when the settlement should have been made, with interest, or the administrator may take the principal sum, with his proportion of the profits.—Huggins v. Huggins, Ga., 43 S. E. Rep. 759.

103. PAYMENT—Cash Sale. — In the absence of an express agreement to the contrary, the giving of a draft in settlement of a cash demand is not payment thereof — Flannery v. Harley, Ga., 43 S. E. Rep. 765.

104. PERJURY—Evidence.—Testimony given by defendant, under objection, on cross-examination, on trial for perjury, being incompetent as bearing on the offense, the court should have charged it was admitted only to impeach his character and credibility. — State v. Austin, N. Car., 43 S. E. Rep. 905.

105. RAILROADS—Killing Stock.—Where, in an action for killing stock, plaintiff relies on the presumption of law arising from the killing, and this presumption is rebutted by uncontradicted evidence, a verdict for plaintiff cannot stand.—Seaboard Air Line Ry. v. Walthour, Ga., 43 S. E. Rep. 720.

106. RAILROADS — Licensee. — Person using railroad track held a licensee, and not a trespasser. — Jones v. Charleston & W. C. Ry. Co., S. Car., 43 S. E. Rep. 884.

107. RAILROADS—License to Cross Pathway.—In an action against a railroad for injuries sustained by one struck by a car while crossing a path, held error to instruct that the employees of the railroad should have knowledge that the path was used by the public.—Over v. Missouri, K. & T. Ry. Co., Tex., 73 S. W. Rep. 535.

108. RAILROADS—Person on Track. — Person killed on railroad tracks held a trespasser, so that, in the absence of wanton or willful injury, his administrator's action was properly dismissed. — Gunther v. New York Cent. & H. R. R. Co., 81 N. Y. Supp. 395.

109. RAILROADS — Speed of Trains. — City ordinance, limiting speed of trains to six miles an hour, held unreasonable as to an unpopulous part of the city.—City of Plattsburg v. Hagenbush, Mo., 73 S. W. Rep. 725.

110. SALES — Delivery by Carrier. — Though a carrier may become an agent, so that delivery to him will be a delivery to the consignee, it cannot render the consignee liable to the consignor on misdelivery of the goods.—Williams v. Coleman, Ga., 43 S. E. Rep. 715.

111. SHERIFFS AND CONSTABLES — Execution.—A levying officer is not bound to inquire into the validity of the proceedings on which the execution is based, if the process is from a court of competent jurisdiction and regular on its face. — Wilbur v. Stokes, Ga., 43 S. E. Rep. 856.

112. STREET RAILROADS — Contributory Negligence.—Parent of child killed by a street car on his return from school held not guilty of contributory negligence in allowing him on the street unattended.—Sullivan v. Union Ry. Co., 81 N. Y. Supp. 449.

113. TAXATION — Transfer Tax.—Stocks in foreign corporations, owned by a non-resident decedent, are not subject to transfer tax in New York.—*In re* Bishop, 81 N. Y. Supp. 474.

114. TENANCY IN COMMON — Insufficiency of Equitable Title. — Though the holder of an undivided half interest in the equity to certain land acquires in his own name the outstanding legal title, such title does not thereby vest in his co-owner of the equity. — Nalle v. Thompson, Mo., 73 S. W. Rep. 599.

115. USURY — Renewal of Note.—The renewal of a note drawing a usurious rate of interest held not to amount to a payment. — Rushing v. Bivens, N. Car , 43 S. E. Rep. 798.

116. USURY — Security Deed.—That part of a debt represented by a married woman's note is usurious, and part that of her husband, does not relieve her from liability for the portion she herself owes. —Lanier v. Olliff, Ga., 43 S. E. Rep. 711.

117. WAREHOUSEMEN—Right of Bailor.—A warehouseman, who had insured its property and that of a bailor for enough to cover the goods destroyed, held liable to him, having settled for less.—Southern Cold Storage, etc., Co. v. A. F. Dechman & Co., Tex., 73 S. W. Rep. 545.

118. WILLS—Construction.—The construction given to a will by the members of testator's family is a circumstance entitled to weight in construing the will, though not conclusive.—Smith v. Bartlett, 81 N. Y. Supp. 281.

119. WILLS — Estate in Fee. — An estate in fee created by a will cannot be cut down by a subsequent clause , unless it is as clear as the language of the clause which devises the real estate.—Roberts v. Crume, Mo., 73 S. W. Rep. 662.

120. WITNESSES — Competency. — Under Code 1896, § 1794, a defendant to a suit by an executor on a promissory note payable to the decedent cannot testify that the note was given for the debt of her husband.—Engle hart v. Richter, Ala., 33 So. Rep. 939.